Supreme Court, U.S.
FILED

97 1636 APR 6 1998

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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. Did the lower courts err in denying as untimely SCOTWINC and its members' motion for intervention, even though the opportunity for SCOTWINC to address the issue directly affecting its interests (that the tribal-state compact required continued state taxation of SCOTWINC for the benefit of the tribes notwithstanding the unconstitutionality of that tax) arose after remand by the Ninth Circuit?

2. Did the lower courts err in denying as untimely SCOTWINC and its members' motion for intervention given the significance of their interest in the proceedings, viz., is the redistribution to Indian tribes of taxes imposed on SCOTWINC an unlawful taking of property in violation of the Fifth and Fourteenth Amendments, notwithstanding that the redistribution to Indian tribes of taxes imposed on SCOTWINC occurs pursuant to a tribal-state compact negotiated under the Indian Gaming Regulatory Act?

LIST OF PARTIES TO THE PROCEEDING

Del Mar Thoroughbred Club
Hollywood Park, Inc.
Los Angeles Turf Club
Oak Tree Racing Association
Los Alamitos Race Course
Los Angeles County Fair
Southern California Off-Track Wagering, Inc. (SCOTWINC)
State of California
California Horse Racing Board
Cabazon Band of Mission Indians
Sycuan Band of Mission Indians
Viejas Band of Mission Indians
Barona Band of Mission Indians

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PETITION FOR WRIT OF CERTIORARI

Southern California Off-Track Wagering, Inc. (SCOTWINC), Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course, and the Los Angeles County Fair respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

CITATIONS TO OPINIONS BELOW

1. *Cabazon Band of Mission Indians, et al. v. State of California,* 788 F.Supp. 1513 (E.D. Cal. 1992) (*"Cabazon I"*)
2. *Cabazon Band of Mission Indians et al. v. Wilson,* 37 F.3d 430 (9th Cir. 1994) (*"Cabazon II"*)
3. *Cabazon Band of Mission Indians, et al. v. Wilson,* 124 F.3d 1050 (9th Cir. 1997) (*"Cabazon III"*)

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals in the consolidated appeal was filed on September 2, 1997. SCOTWINC's petition for rehearing was denied and the suggestion for rehearing *en banc* rejected on January 14, 1998. This Court has jurisdiction pursuant to 25 U.S.C. § 1254.

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[1] For brevity's sake, the petitioners will collectively be referred to as "SCOTWINC" or "SCOTWINC and its members."

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 24(a)

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Two of the respondent Indian tribes filed complaints for declaratory relief in the District Court asserting that taxes on wagers placed at off-track facilities located on Indian lands were impermissible under the Indian Gaming Regulatory Act ("IGRA").[2] The tribes based jurisdiction on 28 U.S.C. sections 1331 and 1362.[3] After the issuance of *Cabazon II*, the District Court assumed jurisdiction over both the original tribes' amended complaints and the complaints of two intervening tribes which alleged breach of the State's obligations under the tribal-compact based on a construction of IGRA that implied

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[2] 25 U.S.C. sec. 2701, et seq.

[3] *Cabazon I*, p. 1514.

jurisdiction over allegations of breach because of the court's express jurisdiction over complaints of bad faith negotiations.[4] App. 37.

B. Summary of Relevant Facts and Proceedings Below

Until the issuance of the October, 1994 opinion of the Ninth Circuit Court of Appeals in *Cabazon II*, the significance of this case for Southern California Off-Track Wagering, Inc. ("SCOTWINC") – an organization created under the California Horse Racing Law consisting of racing associations, fairs, and horse owners in order to facilitate the transmission of the satellite signal of horse races to off-track locations – was limited.[5] The only

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[4] Also for brevity's sake, each of the respondent Indian tribes will collectively be referred to as "the tribes."

[5] The Horse Racing Law is found at California Business and Professions Code sections 19400, et seq. The authority to form SCOTWINC is found at section 19608.2. The Horse Racing Law permits the racing associations, racing fairs, and organizations representing horse owners to form simulcast organizations to operate the satellite wagering equipment and parimutuel system. The purpose of the organization is to permit the racing associations providing the audiovisual signal "the ability to do so without undue burden and expense, to avoid unnecessary duplication of facilities, to permit the associations to protect the security of their signals . . . [and] the integrity of their parimutuel pools and to account for wagering proceeds included in the parimutuel pools. Cal. Bus. & Prof. Code sec. 19608.2(a). The simulcast organization created by racing associations and fairs located in the "southern zone" of the State (which is defined in Cal. Bus. and Prof. Code sec. 19530.5 and in which all the Tribes who are parties to this litigation are located) is known as SCOTWINC.

question posed by the tribes in their original complaints in this matter was whether the State of California was improperly taxing *Indian tribes* on the wagers placed at off-track wagering facilities located on Indian lands, an assertion raised in the respondent tribes' original complaints. *Cabazon I*, p. 1514. The proffer of this question to the District Court was part of the several tribal-state compacts negotiated between the tribes and the State of California. *Cabazon I*, p. 1516.

The answer to that question seemed obvious to SCOTWINC, because since the advent of satellite wagering in California, only a decade ago, racing associations have paid a license fee to the State for wagers made on their horse races which were placed at off-track locations.[6] The "guest facility" – the fair or race track (or pursuant to the tribal-state compact, an Indian tribe)

California law limits off-track wagers to race tracks (who act as "guest facilities" when accepting wagers on races run at another race track) and fairs. Cal. Bus. and Prof. Code secs. 19605, 19605.1, 19605.2. The law also requires that racing associations and off-track facilities enter into a contractual agreement specifying the terms under which the audiovisual signal will be transmitted. Cal. Bus. and Prof. Code sec. 19605.3. Under the terms of the tribal-state compacts, SCOTWINC was authorized to enter into such a contractual arrangement with the respondent tribes. *Cabazon I*, p. 1515.

[6] The state license fee for wagers placed at satellite (or "off-track") wagering facilities amounts to approximately 3.5% of each wager, although the actual fee varies, depending on the horse racing event, from 1.5% to 4%. Cal. Bus. and Prof. Code secs. 19605.7 and 19605.71. The racing associations are responsible for paying these license fees to the State. Cal. Bus. and Prof. Code secs. 19605.7(i) and 19605.71(d).

which houses the facility that *receives* an audiovisual signal from a race track operating a live horse racing meet – is paid a commission of 2% of each wager placed at the satellite facility, undiminished by any state license fee or other distribution.[7] SCOTWINC provides the personnel who handle all the wagers at the guest facility (who are licensed by the California Horse Racing Board) and all funds are transmitted to the race tracks for appropriate distribution. *Any monies which are left after the appropriate distributions have been made are distributed equally between the racing associations and the horse owners; thus these funds are the property of the racing industry participants.*[8]

The legal question presented by the tribes changed, however, when the District Court considered the matter on remand after the Ninth Circuit rejected the tribes' argument of improper taxation on *the tribes*. *Cabazon II* made clear that the state license fee is not imposed on Indian tribes (or any guest facility), but rather on SCOTWINC's members.

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[7] As with all off-track wagers, those placed at the tribal facilities are combined in the parimutuel pool generated by other off-track locations and with on-track wagers. It is out of this pool that winners are paid (approximately 83% of each wager) and various distributions are made (commonly known as the "takeout"), both to the racing associations and horse owners, and to the guest facilities (such as the tribal facilities), the State, and various other designated entities. Cal. Bus. and Prof. Code secs. 19605.7, 19605.71, 19610.

[8] Cal. Bus. and Prof. Code sec. 19605.8.

The District Court permitted the tribes to amend their complaints and allege that the State was in breach of the tribal-state compact. Notwithstanding that the Ninth Circuit held the license fee to be invalid under IGRA, the tribes' amended complaints asserted the terms of the tribal-state compacts required the State to continue to collect the fee from SCOTWINC's members and pay over the invalid license fees to the tribes. The District Court, albeit with reluctance, granted judgment to the tribes and ruled that SCOTWINC's motion for intervention as of right was untimely. App. 36, 54, 56. The District Court's order was subsequently affirmed in *Cabazon III*.

REASONS FOR ISSUING WRIT

The Writ Should Issue Because SCOTWINC and its Members Should Have Been Permitted to Intervene As of Right in Order to Challenge A Construction of the Tribal-State Compact Requiring that License Fees Collected from Racing Associations and Horse Owners Must be Paid to Respondent Indian Tribes.

This Court has long recognized that the refusal of the lower courts to permit one to intervene as a party entitles the proposed intervenor to seek a writ of certiorari to review the denial of intervention. (See, *United Auto Workers v. Scofield*, 382 U.S. 205, 209 (1965); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corporation*, 510 U.S. 27, 29 (1993).) Under the criteria set forth in Rule 24 of the Federal Rules of Civil Procedure, petitioners SCOTWINC and its members should have been permitted to intervene as of right.

The lower courts did not dispute SCOTWINC's claim of its right to intervene, but rather denied SCOTWINC's motion for intervention as of right solely on the ground that it was untimely. *Cabazon III*, pp. 1060-1062. As explained herein, the point at which SCOTWINC attempted to intervene was not unreasonable given the posture of the case. In any event, given the lack of prejudice to the parties, the magnitude of SCOTWINC's interest, and the changed circumstances of the litigation after remand, SCOTWINC and its members should have been permitted to intervene.

As the Ninth Circuit noted, applications for intervention as of right must be interpreted broadly in favor of intervention. *Cabazon III*, p. 1061. Moreover, timeliness must be determined by reviewing "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; and (3) the reason for any delay in moving to intervene." *Ibid.* Of these three factors, the Ninth Circuit focused exclusively on determining when SCOTWINC's claimed interest was implicated and, in so doing, misstated the development of this case.

As noted earlier, the only issue before the District Court in the initial proceeding was whether the deduction of state license fees from the revenue generated at the tribes' facilities was an impermissible tax on the tribes. Indeed, the tribes' complaints ask only for a declaratory judgment finding that the tax is impermissible because it is imposed *on the tribes*. *Cabazon I*, p. 1514. The District Court rejected this contention and held that the fee was not an impermissible tax, stating:

> "State law places the duty to pay the license fee on the *racing associations*. Bus. & Prof. Code §§ 19605.7(i) & 19605.71(d). If California cannot tax the revenue derived from betting at simulcast facilities located on the Tribes' lands, these revenues would be distributed 50% to the racing associations and 50% as purses to horsemen who participate in the races. Cal. Bus. & Prof. Code §§ 10605.8 & 19606. Because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes."

Cabazon I, p. 1517, emphasis added.

At this point, the racing associations had no legal interest that would have justified intervention in a proceeding in which the only issue was the taxing power of the State over the tribes. *Cabazon II*, however, reversed the District Court and held that:

> "As the [District C]ourt explained, 'because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes.' *Cabazon Band*, 788 F. Supp at 1518. State law does not govern this case, however. Rather, the terms of the compact control. . . . Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the

> State receives from the racing associations based on wagers at Indian facilities."

Cabazon II, pp. 433-434.

Thus, the Ninth Circuit ultimately acknowledged that the racing associations, not the tribes, pay the state license fee. The tribes' argument to the lower courts, however, never wavered from the assertion that the State was unlawfully taxing them, which explains SCOTWINC's decision not to attempt intervention in the dispute between the tribes and the State. Although the effect of the tribal-state compact upon the parties should the state license fee be declared impermissible was not before the court, the Ninth Circuit nonetheless concluded that the tribal-state compacts require the State to transfer to the tribes fees paid by the racing associations, notwithstanding the associations' rights to all revenues not required to be distributed pursuant to California Business and Profession Code section 19605.8. While it is arguable that SCOTWINC's interests were implicated at this point, it is not likely that intervention would have been granted because the cause was concluded.

On remand, the case took on a second life. The District Court acknowledged in its order of July 12, 1995, that the "litigation has now entered a new and confusing stage." The District Court was referring to the fact that the State was refusing to transfer the simulcast fees to the Cabazon and Sycuan tribes on the ground, among others, that (1) the Ninth Circuit's determination that federal law preempted the state license fee, and its finding that the settlement provisions of the compacts established a tribal "right" to the tax revenues, imparted a meaning to the

compacts that the State never intended and to which the State never agreed (thereby invalidating the compacts); and (2) the Cabazon and Sycuan tribes themselves breached their compacts with the State by operating illegal slot machines. Indeed, the State challenged the very jurisdiction of the District Court to hear the tribes' claim to entitlement of the state license fee, an argument rejected by that court. App. 37.

Although determining that it had jurisdiction, the District Court held that the tribes were required to amend their complaints if they sought an order that the State pay the tax revenues to the tribes. In its response, the State asserted five affirmative defenses and three counterclaims. One of the State's affirmative defenses was the tribes' failure to join the racing associations as indispensable parties. App. 36-37.

The pleading of this defense is the first time the statutory rights of SCOTWINC and its members to the invalid state license fee became a triable issue in this litigation. Motions to strike all of the State's affirmative defenses were filed by the tribes and granted by the District Court. The State filed a motion for reconsideration but did not seek reconsideration of the District Court's ruling striking the indispensable party defense. Before the District Court's scheduled hearing date concerning the motion for reconsideration, SCOTWINC moved to intervene.

On these facts, SCOTWINC contends that the District Court and the Ninth Circuit erred in holding that the racing associations could not intervene because they had been "aware" of this litigation for many years. The test

for timeliness in an intervention motion is when the applicant becomes aware that its interest would no longer be protected adequately by the parties, not the date when the applicant first became aware of the litigation. *Legal Aid Society of Alameda v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Contrary to the lower courts' statements, while this litigation may have been pending for "years," SCOTWINC's interest did not become a triable issue in this litigation until the District Court permitted the tribes to amend their complaints to seek affirmative relief and the State asserted and was denied its indispensable party defense.

Although SCOTWINC's intervention motion was not filed until after the District Court entered its order on remand in favor of the tribes, the time was reasonable given the circumstances outlined above. No finding was made that any party was prejudiced. Moreover, the tribes' amendment of their complaints created a new cause of action. When the issues raised in the course of litigation change, courts considering an intervention request must judge the timeliness issue in the context of the changed circumstances presented.

In *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984), the State of Idaho sought to intervene in an action initially filed by the United States and the Warm Springs Indian Tribes against the State of Oregon. The parties earlier agreed to a five-year plan managing fisheries on the Columbia River. Upon expiration of the plan, the tribes served notice of their intent to withdraw, and, one week prior to the District Court's order requiring the parties to attempt to agree on a modified plan, the State

of Idaho sought intervention. Idaho argued that "changed circumstances" – the possibility of new and expanded negotiations – justified intervention late in the litigation. In reversing the District Court's denial of the motion, the Ninth Circuit noted that "mere lapse of time alone is not determinative." *Id.* at 552. Holding that the litigation was entering a new stage, Idaho was permitted to intervene. The *Oregon* decision also relied on *Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 293 (3rd Cir. 1982) ("intervention should have been granted where applicant sought to participate in a new phase of litigation"). See also *Pellegrino v. Nesbit*, 203 F.2d 464, 465 (9th Cir. 1953) (court should consider not only period of time that has passed but also circumstances contributing to the delay).

In the context of post-judgment motions to intervene, this Court has held that a motion filed promptly after the entry of judgment is timely. See, *NAACP v. New York*, 413 U.S. 345, 366.

In addition intervention should be allowed, even after a final judgment, where it is necessary to preserve some right which cannot otherwise be protected. See, *Pellegrino v. Nesbit*, 203 F.2d 464, 465, *supra; Cuthill v. Ortman-Miller Mach. Co.*, 216 F.2d 336, 338 (7th Cir. 1954). In this case, the basis of SCOTWINC's motion in the District Court was that the construction of the compacts urged by the tribes and adopted by that Court amounts to an unconstitutional taking of their property. Obviously, the State of California does not believe its actions in negotiating compacts with the tribes were unconstitutional. The State has repeatedly asserted that it disagrees

lower courts. However, with all due respect to the State and the State's actual intentions, as a practical matter the issue of a constitutional taking can more effectively be advanced by the owner of the property interest taken than by the party who may have inadvertently caused the taking.

The Ninth Circuit has held that the test for whether a proposed intervenor is "adequately" represented is "(1) Are the interests of a present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; (2) is that present party capable and willing to make such arguments; and (3) if permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties in the suit?" *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); see also, *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980).

Although the State raised SCOTWINC's statutory rights by way of a rejected affirmative defense, the State did not raise the issue again in its motion for reconsideration or in its appeal to the Ninth Circuit. If SCOTWINC's rights are not addressed in this proceeding, they will have to be addressed in a state proceeding in which the State is the only party.[9] If SCOTWINC prevails, the State

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[9] Both the District Court and the Ninth Circuit suggested that SCOTWINC and its members "will be free to pursue any grievance they may have against the State in a separate action if they so choose." *Cabazon III*, p. 1061, n.3. However, as was pointed out in the briefs filed to the lower courts, the State may assert 11th Amendment immunity to any claim for money

will be liable for monies it has paid the tribes. Given this potential liability, it cannot be assumed that in the absence of SCOTWINC, the State will vigorously advance arguments which might benefit SCOTWINC and its members in a separate state proceeding.

Thus, SCOTWINC and its members should have been permitted to intervene as of right in this litigation.

CONCLUSION

For each of the reasons stated herein, this Court is respectfully requested to grant the petition for certiorari.

Respectfully Submitted,

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damages filed in federal court and any claim asserted in state court might be subject to the vicissitudes of legislative appropriation. See, e.g., *Calif. State Employees Assn. v. Flournoy*, 32 Cal.App.3d 219 (1973).

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CABAZON BAND OF MISSION INDIANS, PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe; SYCUAN BAND OF MISSION INDIANS, *Plaintiffs-Appellees,* BARONA BAND OF MISSION INDIANS, a federally-recognized Indian tribe a/k/a Barona Group of Capitan Grande Band of Mission Indians, *Plaintiff-Intervenor-Appellee,* VIEJAS BAND OF MISSION INDIANS, *Intervenor-Appellee,* v. PETE WILSON, Governor of the State of California; STATE OF CALIFORNIA; CALIFORNIA HORSE RACING BOARD, *Defendants-Appellants.* SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC.; DEL MAR THOROUGHBRED CLUB; HOLLYWOOD PARK, INC.; LOS ANGELES TURF CLUB; OAK TREE RACING ASSOCIATION; LOS ANGELES COUNTY FAIR; LOS ALAMITOS RACE COURSE, *Applicants in Intervention-Appellants.*	Nos. 96-16432 96-16443 D.C. No. CV-90-01118-DFL OPINION

Appeals from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
April 16, 1997 – San Francisco, California

Filed September 2, 1997

Before: Charles Wiggins, John T. Noonan, and
Stephen S. Trott; Circuit Judges.

Opinion by Judge Trott; Dissent by Judge Wiggins

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George Forman, Forman & Prochaska, San Rafael, California, for plaintiffs-appellees the Sycuan Band of Mission Indians.

John Winkelman, Alpine, California, for plaintiffs-intervenors-appellees the Viejas Band of Mission Indians.

Art Bunce, Escondido, California, for plaintiffs-intervenors-appellees the Barona Band of Mission Indians.

Cathy Christian, Nielsen, Merksamer, Parrinello, Mueller & Naylor, Sacramento, California, for applicants in intervention-appellants.

OPINION

TROTT, Circuit Judge:

I. Overview

The plaintiffs in this case are four bands of Indians – the Cabazon Band of Mission Indians, the Sycuan Band of Mission Indians, the Barona Band of Mission Indians, and the Viejas Band of Mission Indians (collectively, the "Bands") – who operate simulcast wagering facilities on their tribal lands. In this suit, the Bands seek to force the defendants – Governor Pete Wilson, the California Horse Racing Board, and the State of California (collectively, the "State") – to turn over to the Bands license fees which the State collects from California's horse racing associations based on the revenues generated at the Bands' facilities.

The action arises out of Tribal-State Compacts into which the parties entered pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721. In those Compacts, the parties agreed to submit to the district court the question of whether the license fees are permissible under IGRA. Because the State agreed to turn over the fees to the Bands if the fees are impermissible under IGRA, and because we held in a prior decision that the fees are impermissible, we affirm the district court's decision ordering the State to turn over the fees.

Also before us is the appeal by Southern California Off-Track Wagering, Inc. ("SCOTWINC") and six racing parks (collectively, the "Applicants") from the district court's denial of their motion to intervene as defendants. Because the Applicants waited until after the district

court had resolved the vast majority of the case and until only the motion for reconsideration remained, we affirm the district court's denial of intervention.

II. Background

Despite its long and convoluted history, this case begins and ends with four Tribal-State Compacts, entered into by the State and each Band pursuant to IGRA. These Compacts govern the Bands' operation of simulcast wagering facilities and the State's collection of fees from that activity. In these Compacts, the State agreed to pay over to the Bands the amounts of past and future license fees it collected from the racing associations, if a federal district court declared the fees impermissible under IGRA. In a prior decision, we declared them impermissible. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (hereinafter, "*Cabazon II*"). We now hold the State to the terms of the Compacts to which it agreed.

A.

The initial story is set forth in the district court's decision in *Cabazon Band of Mission Indians v. State of California*, 788 F. Supp. 1513 (E.D. Cal. 1992) (hereinafter, "*Cabazon I*"), and in our decision in *Cabazon II*. We will review only the necessary facts. IGRA authorizes Indian tribes to conduct certain gaming operations on tribal lands and establishes three classes of gaming operations. Off-track betting on horse racing at simulcast facilities is classified as class III gaming under IGRA and is permissible only if: (1) it is authorized by the governing body of the Indian tribe, (2) it is located in a State that permits

such gaming, and (3) it is conducted in conformance with a Tribal-State compact. 25 U.S.C. § 2710(d)(1).

California permits such off-track wagering, having established an extensive state regulatory scheme to dictate how the money wagered on these races is distributed. *See* Cal. Bus. & Prof. Code §§ 19605-19611. The statutory plan provides for distribution of all wagers in predetermined percentages to various entities, including the State, the simulcast facility operators (here, the Bands), and the racing associations. *See id.* § 19605.71. After the bettors receive their winnings and these statutory distributions are made, the remaining funds are divided equally between the horsemen and the racing associations. *See id.* §§ 19605.8, 19606. Under California's regulations, the racing associations pay license fees to the State in the amount of 1.5% to 4.0% of the revenue generated at the off-track facility. *See id.* §§ 19611, 19606.5, 19606.6, 19605.7(i), 19605.71(d).

In 1990 and 1991, the four Bands and the State entered into compacts pursuant to IGRA allowing the Bands to operate off-track wagering facilities on their lands. The Compacts set out the distribution of the wagers, mirroring the distributions set forth in the State's regulatory scheme. The Bands and the State, however, could not agree whether California has jurisdiction to collect license fees based on revenues generated at the Bands' simulcast facilities. In the Cabazon and Sycuan Compacts, those Bands and the State therefore agreed to submit the issue to a federal district court for resolution. They also agreed that if the fees were impermissible, the State would pay the past and future fees it collected over to the Bands, and if the fees were permissible, the State

would retain and continue to collect the fees. These terms were set out in Paragraph 19 of the Cabazon Compact[1] as follows:

> (B) *State License Fee.*
>
> 1. Cabazon shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee under Business and Professions Code Section 19596.6, subdivisions (d)(1), (d)(2), (k), and (l), **are permissible under the Act** [, IGRA].
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> 2. In the event a final judgment is obtained that the deduction and distribution of the state license fee is permissible under the Act, and following the exhaustion of all appellate review, the State shall retain all license fees previously distributed to it, and shall be entitled to collect the state license fee from all wagers at the Cabazon simulcast wagering facility. . . .
>
> 3. In the event a final judgment is obtained that the deduction of the state license fee is impermissible under the Act, and following the exhaustion of all appellate review, **the State shall pay over to Cabazon the amount of all state license fees previously distributed to the State under this Compact** exclusive of assessments due and owing under subparagraph 4, below, and **Cabazon shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Cabazon**

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[1] The language of the Cabazon and the Sycuan Compacts concerning resolution of the license fee dispute is virtually identical.

> **simulcast wagering facility**. The amount of state license fees previously distributed to the state and not reasonably claimed by the State as due and owing from the commencement of operation of the facility shall be paid over to Cabazon as soon as practicable and in any event, not later than sixty (60) days following final judgment.

(Emphasis added.) The Barona and Viejas Bands similarly disagreed with the State about the license fees; in their Compacts, these Bands and the State agreed to be bound by the result in the Cabazon and Sycuan litigation.

Pursuant to the Compacts, the Cabazon and Sycuan Bands brought suit in the district court, seeking a declaratory judgment. The district court held that the collection of license fees was permissible under IGRA because the fees did not constitute either a direct tax or an impermissible indirect tax on the Bands. *Cabazon I*, 788 F. Supp. 1513. We reversed. *Cabazon II*, 37 F.3d 430. We held that "IGRA preempts the State of California from taxing off-track betting activities on tribal lands." *Id.* at 435. Analyzing "whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance," *id.* at 433, we considered federal, tribal, and state interests in the extension of the State's licensing scheme to tribal gaming. Central to our analysis was our conclusion that, under the terms of the Compacts which govern this case, the Bands have a "right" to the unpaid license fees. We remanded to the district court with instructions to enter summary judgment in favor of the Cabazon and Sycuan Bands. Our decision in *Cabazon II* is central to the resolution of the instant dispute, and it limits the task before us.

B.

After *Cabazon II*, the litigation entered, in the words of the district court, "a new and confusing stage." The State refused to pay the fees to the Bands, declared the Compacts invalid, and threatened to cut off the simulcast signal unless the Bands agreed to enter into negotiations for new compacts. In response, the Cabazon and Sycuan Bands moved for an injunction to prevent the cessation of the signal. Invoking 28 U.S.C. § 2202, those Bands also sought enforcement of the Compact provisions requiring the State to pay past and future fees. The Barona and Viejas Bands moved to intervene as plaintiffs. The State opposed enforcement of Paragraph 19(B)(3), arguing: (1) the district court lacked subject matter jurisdiction to enforce the Compacts; (2) the State was immune under the Eleventh Amendment from the Bands' attempt to enforce the Compacts; (3) our *Cabazon II* decision, holding that the fee was not a tax but was nonetheless impermissible, was so unexpected that it invalidated the Compacts; and (4) the Bands breached the Compacts by operating illegal gaming operations.

Concluding that it had subject matter jurisdiction under IGRA to enforce the Compacts and that the State had waived its Eleventh Amendment immunity in the Compacts, the district court considered whether a § 2202 motion was the appropriate procedural vehicle to resolve the remaining issues. The district court first determined that it could resolve the State's claim that our decision was so unexpected as to invalidate the Compacts. The State sought to introduce the negotiating history of the Compacts to show that the parties did not foresee a decision that found the fee to be impermissible but not to

be a tax on the Bands. On July 12, 1995, the district court rejected this effort to introduce extrinsic evidence as to the intent of the parties, concluding that "the Compacts placed the legality of the licensing fee before the Court of Appeals without restriction and provided for the possibility that the fee would be declared invalid." 7/12/95 order at 15. The district court then concluded that it could not consider the Bands' claims that the State was in breach of the Compacts and, accordingly, ordered the Bands to amend their complaints to seek relief for breach of the Compacts under IGRA. The district court stated that it would enter a preliminary injunction once the Bands filed their amended complaints. Finally, the district court granted the Barona and Viejas Bands' motion to intervene.

The Bands then filed an amended complaint, seeking a declaration of the rights and obligations of the parties under Paragraph 19(B)(3) of the Compacts and the enforcement of the Compacts. In its answer, the State asserted, as affirmative defenses and counterclaims, that: (1) it was immune under the Eleventh Amendment; (2) the Bands violated IGRA by operating illegal slot machines, thus breaching the Compacts and excusing the State's performance; (3) the Bands failed to join indispensable parties – the racing associations; (4) the Compacts are invalid because the State never promised to pay license fees to the Bands if the court determined those fees fell on the racing association rather than the Bands; and (5) the Compacts are invalid under IGRA because the Bands are not the primary beneficiaries. On April 26, 1996, the district court rejected the State's contentions, granted the Bands' motion to strike the affirmative

defenses, dismissed the counterclaims, and ordered the State to report within fourteen days how it would comply with the Compacts.

At this point in the litigation, SCOTWINC and six racing associations moved for leave to intervene as defendants in this action. The district court denied the motion as untimely. SCOTWINC and the tracks appeal the denial of intervention.

The State then moved to reconsider. On July 19, 1996, the district court denied the motion for reconsideration and granted summary judgment in favor of the Bands. The court ordered the State to pay over to the Bands the license fees from pari-mutuel offtrack wagering at the Bands' simulcast facilities. The State appeals this order of the district court.

III. Jurisdiction

Initially, we must determine whether the district court had subject matter jurisdiction over the Bands' action to enforce the Compacts and to require the State to pay over to the Bands the license fees. The State contends that the court lacked jurisdiction, arguing that the Compact provision at issue – Paragraph 19 – is merely a contractual agreement incorporated into the Tribal-State Compacts. The dispute, they reason, is purely contractual in nature and therefore beyond the jurisdiction of the federal courts. Although it is true that the federal courts do not have jurisdiction over run-of-the-mill contract claims brought by Indian tribes, *see Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708 (9th Cir. 1980), this claim is not based on a contract

that stands independent of the Compacts. Rather, it is based on an agreement contained within the Compacts and entered into by the parties, during their IGRA negotiations, in order to resolve a disputed question and to complete the Compacts. The State's obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law; moreover, IGRA prescribes the permissible scope of the Compacts. We conclude that the Bands' claim to enforce the Compacts arises under federal law and thus that we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

The State argues that IGRA confers federal jurisdiction over only the three causes of action specified in 25 U.S.C. § 2710(d)(7)(A)(i)-(iii): (1) an action arising from the failure of the state to enter into negotiations or conduct negotiations in good faith; (2) an action to enjoin class III gaming activity on Indian lands that is conducted in violation of a compact; and (3) an action to enforce mediation procedures in the event a compact cannot be reached. We believe that the State construes both federal question jurisdiction and IGRA too narrowly and underestimates the federal interest at stake. In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986), the Supreme Court recognized that "[s]everal commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the nature of the federal interest at stake." The Court noted "the importance of the federal issue in federal-question jurisdiction". The district court recognized the federal interest at stake here and the importance of the enforcement of Tribal-State compacts in the federal courts:

> It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous.

7/12/95 order at 8. We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose. IGRA necessarily confers jurisdiction onto federal courts to enforce Tribal-State compacts and the agreements contained therein.

Our conclusion is bolstered by IGRA's express authorization of a compact to provide remedies for breach of contract. 25 U.S.C. § 2710(d)(3)(C)(v). This provision invites the tribe and the state to waive their respective immunities and consent to suit in federal court. By envisioning the enforcement of a compact and any contractual obligations assumed pursuant to a compact in federal court, IGRA necessarily confers jurisdiction to the federal courts.

An alternative ground for jurisdiction exists. We held in *Cabazon II* that federal law preempts the State from collecting the taxes. The Bands sue to recover money taken by the State in violation of federal law. The Bands's cause of action arises under the laws of the United States.

Jurisdiction exists under 28 U.S.C. § 1362; *see Forest County Potawatomi Comn:. of Wis. v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995).[2]

Thus, the Bands' action seeking to enforce the Tribal-State Compacts clearly and necessarily arises under IGRA, and we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

IV. Enforcement of the Compacts

The State presents four major arguments as to why we should not enforce Paragraph 19(B)(3): (1) the State is immune from suit under the Eleventh Amendment; (2) the State never agreed to surrender the license fees it collected from the racing industry to the Bands unless the court determined that they were an impermissible tax on the Bands; (3) the Compacts are invalid because the racing associations and the horsemen, not the Bands, are the primary beneficiaries; and (4) the Bands materially breached the Compacts by operating illegal slot machines, thereby rendering the Compacts unenforceable against the State. Each of these arguments is unavailing.

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[2] Notably, if the federal courts lack jurisdiction to enforce Tribal-State compacts, then both tribes and states may be left with no forum in which to enforce compacts, given the sovereign immunity of each.

A. *Eleventh Amendment Immunity*

The State contends that it is immune from the Bands' action to enforce the Paragraph 19 obligation. The Eleventh Amendment bars Indian tribes from suing state governments in federal court without their consent. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-82 (1992). However, there are two well-established exceptions to the Eleventh Amendment's protections: Congress may abrogate the Eleventh Amendment without the consent of the states when acting pursuant to section 5 of the Fourteenth Amendment, or a state may waive its immunity by consenting to suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). Here, the State waived its Eleventh Amendment immunity in the Compacts.

"[A] State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.' " *Atascadero*, 473 U.S. at 239-40 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotations and alterations omitted)).

In Paragraph 19, the State expressly agreed that the Bands "shall seek a declaratory judgment against the State from a United States District Court of competent jurisdiction as to whether the deduction and distribution of the state license fee . . . are permissible under the Act." Moreover, in Paragraph 19, the State not only consented to the suit, but it also agreed to the remedy.

Further, the State's waiver of its immunity to suit in federal court is not limited to the declaratory judgment action specified in Paragraph 19, but rather extends to all

actions under the Compact. The parties agreed to the following Compact provision: "Judicial review of any action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate United States District Court. . . ." By agreeing to judicial review by the district court of all actions under the Compacts and of any interpretation of the Compacts, the State consented to be subject to suit in federal court for the enforcement of Paragraph 19(B)(3). *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) (general consent-to-suit provision coupled with statutory venue provision clearly indicate that states waived Eleventh Amendment immunity).

B. *Paragraph 19 and the Intent of the Parties*

The State now claims it never intended to surrender the license fees it collected *from the racing industry* to the Bands. It contends that, instead, it agreed in Paragraph 19(B)(3) to pay the license fees to the Bands only if the court determined that these fees constituted a *tax on the Bands themselves* and not on the racing associations. The State wishes to introduce extrinsic evidence which it believes will support this interpretation. We reject the State's proffered construction of Paragraph 19 as contrary to its plain and unambiguous language and reject the State's efforts to introduce extrinsic evidence.

In asking us to examine extrinsic evidence as to the meaning of Paragraph 19, the State attempts to escape the natural consequences of our *Cabazon II* decision. The State first contends that we answered a question which the Compacts did not contemplate presenting to the federal

courts – whether the fees are impermissible even if they are not a tax on the Bands. However, the question framed in the Compacts was broad: "whether the deduction and distribution of the state license fee under [California law] **are permissible under the Act**." As the district court observed, "There is no limitation in the language of the compacts suggesting that the Bands could seek only a determination of whether the licensing fee [was] a tax on the Bands." 7/12/95 order at 14. In *Cabazon II*, we reached a result contemplated by the parties: that the fees are impermissible under IGRA. Thus, the district court properly rejected the State's argument: "The State cannot now be heard to claim that it did not foresee that it would lose the litigation or that the Ninth Circuit would reason in the way that it did." 7/12/95 order at 15.

The State next claims that we did not adjudicate the rights and obligations of the parties under Paragraph 19(B)(3) in *Cabazon II*, and thus that question remains open. Again, the State is mistaken. Although we agreed that "the license fee imposed falls directly upon the racing association, and not the Bands," 37 F.3d at 434, we concluded that "the Bands bear the actual burden of the license fee." *Id.* We reasoned:

> Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees.

Id. Moreover, we made clear that the Compact terms, not state law, govern the resolution of this dispute. *Id.*

Regardless of whether we fully adjudicated the rights and obligations of the parties under Paragraph 19 in *Cabazon II* or whether that issue is before us to address anew, we see no need for extrinsic evidence to illuminate the meaning of Paragraph 19. We will not entertain strained interpretations of a clear and unambiguous compact provision. Instead, we hold the State to its word.

The State repeats its insistence that the phrase "impermissible under the Act" is ambiguous, and that the State intended that phrase to mean only that they were impermissible as a tax on the Bands in violation of 25 U.S.C. § 2710(d)(4). As noted above, the plain language of the Compacts does not contain such a restriction. The State further contends that, in Paragraph 19(B)(3), it agreed only to return to the Bands any taxes that it had imposed on the Bands. It did not agree to surrender to the Bands taxes collected from the racing industry. Once again, however, Paragraph 19(b)(3) is not subject to such a limited interpretation. Paragraph 19(B)(3) contains an unambiguous agreement that, if the license fees are impermissible, the State will pay to the Bands amounts equal to the past license fees already distributed to the State as well as amounts equal to the future license fees it collected. The Compacts do not provide for different remedies should the court determine the fees are impermissible because they are an indirect economic burden on the Bands as opposed to a tax. We simply cannot agree that there is any possible restrictive meaning of Paragraph 19(B)(2) and (B)(3). Thus, we reject the State's offer of extrinsic evidence.

C. *Primary Beneficiaries*

Citing our *Cabazon II* decision, the State asks us to declare the Compacts invalid and unenforceable under IGRA because the racing associations and horsemen receive more revenue from the simulcast wagering than the Bands receive. Reasoning that we drew no distinction between the State and other persons who benefit from class III gaming on tribal lands, the State contends that the Bands are not the primary beneficiaries and thus that the Compacts are invalid.

The State misconstrues our analysis in *Cabazon II*. We did not erect an absolute bar to any Tribal-State compact under which any entity received more revenues from tribal gaming than the tribes. The primary beneficiary analysis in which we engaged extends no further than our consideration of whether IGRA preempts the State's regulatory scheme as to the disputed license fees. Recognizing that "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority," we analyzed the federal, tribal, and state interests in the State's collection of the license fees. *Cabazon II*, 37 F.3d at 433. In that context, we observed that the federal interest in ensuring that the Bands are the primary beneficiaries of the gaming operations was threatened by the State's collection of the license fees. *Id.* However, our analysis did not end there. In order to resolve whether the license fees were impermissible, we considered both the Bands' interests and the State's interests. *Id.* at 434-35.

We are not convinced that, in this instance, a balancing of the competing federal, tribal, and state interests is required. IGRA "authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues." S. Rep. No. 100-446, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3073. Here, the State and the Bands agreed to the application of the state wager distribution system, whereas they did not agree to the imposition of the State licensing fee scheme.

Even if we were to apply the same competing interests analysis utilized in *Cabazon II*, and even if the federal interest in ensuring that the Bands are the primary beneficiaries of the gaming operations would be threatened by the wager distribution formula because the racing associations and horsemen receive greater percentages, our examination could not end there. Again, we would have to balance the Bands' interests and the State's interests. The wager distribution formula does not economically burden the Bands in the same manner as the license fees, because the Compacts do not provide an alternative distribution scheme under which the Bands are entitled to the percentages of the wagers due to the horsemen and racing associations under California law. Moreover, the State has a strong interest in maintaining the wager distribution formula. While the Compacts provided for the reimbursement to the State of regulatory costs and thus satisfied the State's interest without imposition of the license fee, *Cabazon II*, 37 F.3d at 435, there is no alternative provision which would compensate the horsemen and the racing associations for providing the services upon which the success of the tribal gaming facilities –

and the California horse racing industry – depend. Thus, under *Cabazon II*'s primary beneficiary analysis, IGRA does not preempt the extension of the state wagering distribution formula to the tribal gaming facilities with the Bands' consent, even though the racing associations and the horsemen receive greater revenues from the Bands' simulcast wagering facilities than the Bands receive.

D. *Illegal Slot Machines*

Alleging that the Bands are conducting illegal gaming which is not authorized by the Compacts, the State asks us to enjoin the gaming as well as to declare the Compacts unenforceable, excusing the State from performance under Paragraph 19. The State alleges that the Bands are operating large-scale class III gaming operations and are offering banked and percentage games, including slot machines. Such gaming activities are not the subject of a Tribal-State compact. The State, however, has no jurisdiction over gaming activities that are not the subject of a Tribal-State compact.

IGRA limits the state's regulatory authority to that expressly agreed upon in a compact. Outside the express provisions of a compact, the enforcement of IGRA's prohibitions on class III gaming remains the exclusive province of the federal government. In *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995), we held that the State lacked jurisdiction to enforce its criminal laws against class III gaming activities on tribal lands unless the tribe has consented to the transfer to the State

of criminal jurisdiction pursuant to a Tribal-State compact.

The State seeks to avoid the teachings of *Roache* by arguing that the Bands did consent to state regulation of the gaming at issue here by entering into the Compacts. Because the Compacts authorized only simulcast horse racing, the State reasons, the banked and percentage games are being conducted in violation of the Compacts. To reach this conclusion, the State argues that an implied promise not to engage in other class III gaming should be read into the Compacts, because class III gaming not authorized by a compact violates IGRA. It then asserts that 25 U.S.C. § 2710(d)(7)(A)(ii) authorizes it to seek an injunction. Section 2710(d)(7)(A)(ii) provides federal jurisdiction over "any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact. . . . "

The State, however, seeks to extend its regulatory authority beyond what is authorized by IGRA. As the district court noted, "the State would use the compacts as leverage from which to extend its regulatory control to other class III gaming not covered by the compacts." 4/26/96 order at 6. We decline to conclude that the Bands have impliedly consented to the extension of state regulatory authority to their tribal lands, beyond the express provisions of the Compacts, simply by entering into the Compacts.

To understand the states' limited regulatory authority, it is important to remember that, traditionally, Indian tribes were immune from state criminal and regulatory

jurisdiction except to the extent that they consented to be governed by it. In extending state jurisdiction to Indian lands in IGRA, Congress was careful to balance the need for state enforcement of gaming laws with the federal and tribal interests in traditional tribal sovereignty. S. Rep. No. 100-446, at 5, 1988 U.S.C.C.A.N. at 3075. To preserve the long-established principle that the jurisdiction of the state and the application of state law do not extend to Indian lands absent the consent of the tribes, *id.*, tribal consent was a key component of IGRA. The Senate Committee on Indian Affairs explained in its statement of policy accompanying IGRA:

> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.
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> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a Tribal-State compact. In no instance, does S.555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, the relinquishment of such rights . . . shall not be construed . . . as a general

> abrogation of other reserved rights or of tribal sovereignty.

Id. at 5-6, 1988 U.S.C.C.A.N. at 3075-76.

The State contends that the district court makes a mockery of the tribal-state compacting process by requiring the State to exact express promises not to engage in unauthorized gaming activities. We disagree. IGRA simply does not contemplate that a State will obtain unlimited regulatory authority over tribal gaming by entering a limited Tribal-State Compact. As the district court recognized:

> To infer a general covenant in the compacts by the tribes not to engage in gaming in violation of state law and IGRA, would be tantamount to finding a cession by the tribes of general regulatory authority to the State over class III Indian gaming in which the State's enforcement tool would be its threat to void or breach the compact. The text of IGRA, its legislative history and the historical context in which it was passed, all point to the opposite conclusion: that state authority over class III gaming reaches no further than the explicit terms of the tribal-state compacts.

4/26/96 order at 11. The Bands have not consented to state regulation of gaming activities other than that expressly covered in the Compacts. Because the slot machines and other banked and percentage games are not mentioned in the Compacts, the Bands have not breached the Compacts. Further, under IGRA, the State has no jurisdiction to enjoin those gaming activities.

V. Intervention of SCOTWINC and the Racing Associations

On July 11, 1996, SCOTWINC, Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course, and the Los Angeles County Fair moved to intervene as defendants. SCOTWINC is an organization formed by the race track operators pursuant to California Business and Professions Code section 19608.2 to operate the satellite transmission system as well as the system for including amounts bet at offtrack wagering facilities in the parimutuel pools. The remaining Applicants are racetracks who conduct live horse races and who transmit a signal of the races to satellite wagering facilities.

We review de novo a district court's ruling on a motion to intervene as of right. *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995). However, we review for an abuse of discretion whether such an application to intervene was untimely. *Id.*

We have set out a four-part test for intervention pursuant to Rule 24(a)(2): "(1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action." *Id.* This test is interpreted broadly in favor of intervention.

The district court denied the Applicants' motion to intervene as untimely: "This motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation." 7/11/96 order at 1-2. We have outlined three criteria for determining whether a motion to intervene is timely: "(1) the stage of the proceedings; (2) whether the parties would be prejudiced; (3) the reason for any delay in moving to intervene." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996).

We do not reach the question of whether the Applicants have a sufficiently strong interest to justify intervention.[3] However, to determine whether their motion was timely, we must determine when their claimed interest was implicated. We believe that the interest they now assert was apparent early in this litigation. The Applicants explain that they had no interest in the litigation presented in *Cabazon I* and *Cabazon II*, because at that stage, they understood the question presented to be only whether the fees are impermissible as a tax on the Bands. However, from the inception of this litigation, it was clear

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[3] Whether they have such an interest is questionable. As the district court observed in reviewing the State's affirmative defense of failure to join the associations as indispensable parties: "The State argues that taxing the racing association and horsemen and paying those monies to the tribes may violate state law. Even if it does, however, the State's contractual obligation to the tribes will remain, and the racing association and horsemen will be free to purse any grievance they may have against the State in a separate action if they so choose." 4/26/96 order at 15.

that the license fees at issue in this case are paid by the racing associations. Moreover, under the terms of the Compacts, of which the Applicants were aware, it is clear that the State and the Bands agreed that the State would continue to collect the fees from the racing associations, regardless of whether the court found them permissible under IGRA. Paragraph 19(B)(2) and 19(B)(3) clearly contemplate that either the State or the Bands would receive those fees.

Assuming arguendo that the Applicants had no immediate interest in the original litigation, surely they should have known what was in the offing after our October 1, 1994 decision in *Cabazon II* and after the district court, on July 12, 1995, ordered the Bands to file a new complaint to enforce Paragraph 19(B)(3). The Applicants must have been aware that the case might result in the State's continuing to collect money from them and then paying those revenues to the Bands. Nonetheless, the Applicants waited and watched. Instead of moving to intervene, they chose to rely on the State to protect their interests. In its November 21, 1995 answer, the State asserted that the Bands had failed to join indispensable parties – the racing associations. The district court, however, granted the Bands' motion to strike this affirmative defense on April 26, 1996, noting that "there is no indication that the racing association and horsemen have claimed any interest in this litigation, despite having had many years to do so." 4/26/96 order at 14. In that same order, the district court ordered the State to pay the Bands. Thus, by the time the Applicants moved to intervene on July 3, 1996, the district court had already directed the State to pay the fees to the Bands, effectively

resolving the dispute. Even if the court had granted the intervention, the Applicants would only have been able to participate in the motion for reconsideration.

Having made the strategic decision to rely on the State to advance their interests, the Applicants opted to delay moving to intervene in this litigation until long after they should have realized not only that their asserted interest was at stake, but also that their interest had diverged from the State's. They must now live with the ramifications of their delay. They waited too long, and their application for intervention was untimely. The district court's decision to block intervention that late in the litigation was not an abuse of discretion.

VI. Conclusion

The State and the Bands entered into Tribal-Compacts in which they agreed to submit the question of whether the license fees collected pursuant to California Horse-Racing Law are permissible under IGRA. Because the resolution of this dispute was essential to the completion of the Compacts, the parties also agreed to what would happen after the district court's decision. If the district court held that the fees are impermissible, the State would pay over to the Bands those fees, past and future. That contingency has occurred, and we hold the State to its agreement in the Compacts.

AFFIRMED.

WIGGINS, Circuit Judge, dissenting:

I respectfully dissent. I am unable to join the majority opinion because I am not convinced that we have jurisdiction of the Bands' efforts to enforce the terms of their Tribal-State compacts.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (citations omitted). Neither the Constitution nor any federal statute confers the federal courts with jurisdiction of the Bands' efforts to enforce Paragraph 19 of their compacts with the State of California. As a result, I would vacate the district court's judgment and remand with instructions to enter judgment in favor of the Bands on the issue presented by their original complaint.

The majority finds federal jurisdiction of the Bands' efforts to enforce the terms of the compacts pursuant to 28 U.S.C. §§ 1331 and 1362, which each confer federal jurisdiction of claims "arising under" the laws of the United States. Following the reasoning adopted by the district court, the majority concludes that such jurisdiction is "necessarily confer[red]" by the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-21. However, as the majority implicitly recognizes, IGRA does not contain a provision which expressly grants federal jurisdiction of a dispute arising under a Tribal-State compact. Instead, the majority concludes that IGRA created federal jurisdiction over the Bands' claims because otherwise a state could make "empty promises" and the

Bands would be unable to enforce the terms of the agreement in federal court.

When this lawsuit was originally filed in district court, it presented an issue that was unquestionably within the jurisdiction of the federal courts. After our remand, however, the issues presented by this case transformed into something altogether different. No longer was the question whether the State's license fee was permissible under federal law; rather, the district court was asked to determine what rights the parties had under the terms of their Tribal-State compacts and to enforce those rights. As I understand the issues, IGRA is wholly irrelevant to this latter dispute. While IGRA created the Tribal-State compacting process, it does nothing to determine the compact-related rights and obligations of the Bands and the State. The answers to these questions necessarily lie in the language of the compact itself.

In fact, it was the language of the compacts which led to our decision in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) ("*Cabazon II*"), where we held that IGRA preempts the State from collecting its customary license fee on wagers placed at the Bands' offtrack betting facilities. My reading of that opinion convinces me that the State and the Bands could have formulated a Tribal-State compact which would have allowed the State to collect its license fee. Our analysis in *Cabazon II* relies heavily on Paragraph 19 of the Bands' compacts with the State to reach the conclusion that IGRA preempts the State from imposing its license fees on the Bands. *See id.* at 434. A compact without such a provision may not have created the preemption problem which led us to hold that the State could not collect its

customary license fee. The fact that the compact contains this provision does not mean that the Bands' present efforts to enforce the compacts arise under federal law.

The principal authority the majority cites in its jurisdictional analysis is abstract language from a footnote in the Supreme Court's decision in *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986). I do not find this authority persuasive for two reasons. First, *Merrell Dow* dealt with a far different jurisdictional problem than the one presented by the present case. There, the plaintiffs alleged that the defendant's misbranding of a drug in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA") established a rebuttable presumption of negligence in their state law product liability action. The defendant attempted to remove the action to federal court, asserting that the plaintiffs' reliance on the defendant's violation of the FDCA created federal jurisdiction. The Supreme Court, holding that the district court did not have removal jurisdiction, found that the lack of a private right of action under the FDCA was dispositive as to whether the plaintiff's negligence arose under federal law. *Id.* at 817.

Our case is quite different. We must decide whether we have jurisdiction of a dispute about an agreement executed pursuant to a federal law (IGRA) that authorized two sovereigns (a state and an Indian tribe) to enter into such an agreement. As a result, I can't see how the core of *Merrell Dow*'s analysis is germane to our resolution of this issue.

Second, although I recognize that footnote 12 of the *Merrell Dow* decision contains language which suggests

that an evaluation of the "nature of the federal interest" is at the heart of determining whether there is federal question jurisdiction, I do not believe the majority performs this evaluation correctly. The majority, at least in my view, is rather terse when it reaches the conclusion that the nature of the federal interest in this case is substantial enough to warrant concluding that IGRA confers jurisdiction of the Bands' compact enforcement claims to the federal courts. What is the *federal* interest in these claims? That the Bands would be unable to enforce the terms of the compacts? If so, what inference do we draw from the fact that Congress did not expressly provide for federal court jurisdiction of such a claim?

Thus, I turn to the core of the opinion's jurisdictional analysis: "We agree that Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them with immunity whenever it serves their purpose." Opinion at 11043. I think that this argument – that Congress *must have* meant to create federal court jurisdiction of these claims – is flawed.

IGRA expressly confers federal jurisdiction of the following: (1) any cause of action initiated by an Indian tribe that the state refuses to enter into good faith negotiations for the purpose of entering into a Tribal-State compact; (2) any cause of action initiated by a state or Indian tribe to enjoin Class III gaming located on Indian lands and conducted in violation of a Tribal-State compact; and (3) any cause of action initiated by the Secretary of the Interior to enforce the mediation procedures which

go into effect if an Indian tribe and a state are unable to complete a compact. 25 U.S.C. § 2710(d)(7)(A)(i)-(iii).

Obviously, the Bands' efforts to enforce the terms of their compacts with the State does not fit any of these three categories. Congress's jurisdictional grant was both quite specific and quite narrow. Even though it granted federal jurisdiction of disputes arising during the compact negotiation process, Congress expressly chose not to confer federal jurisdiction of compact enforcement claims. The majority's conclusion that we have jurisdiction of the Bands' efforts to enforce the compacts ignores this undisputable indication of Congressional intent. In so doing, the majority ignores the possibility that Congress may have wilfully left jurisdiction of these claims to another forum.

In sum, I am not convinced by the district court's "IGRA is not so vacuous" argument. I think it is just as likely that Congress deliberately left jurisdiction of compact-related claims to the tribal and state court systems. Both the tribal and state court systems would have jurisdiction of an action to enforce the terms of the tribal-state agreements.[1] Given IGRA's silence, I think the holdings of the Supreme Court (*Merrell Dow* included) require us

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[1] A well-drafted Tribal-State compact could contain the necessary waivers of sovereign immunity to provide a forum in which the compacts could be enforced. Here, of course, the Bands could bring an action in a California Superior Court to enforce the terms of their agreement with the state. By doing so, of course, they would be waiving any claim of sovereign immunity.

to conclude that there is no federal question jurisdiction of the Bands' claims.

Similarly, I am not convinced by the majority's effort to distinguish *Gila River Indian Community v. Henningson, Durham & Richardson,* 626 F.2d 708 (9th Cir. 1980). The majority subtly attempts to narrow *Gila River*'s holding by suggesting that it is limited to "run-of-the-mill" contract claims brought by Indian tribes. I cannot agree because I think *Gila River* is almost directly on point.

In *Gila River,* we held that the district court lacked jurisdiction of an Indian tribe's lawsuit against an architectural firm and building contractor for the alleged negligent design and construction of a youth center. The Indian tribe argued that federal common law should govern all Indian contracts, pointing out that federal statutes already regulated certain Indian contracts. We rejected this argument:

> We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws. Nor has the tribe pointed out why national uniformity of rules governing these transactions would be desirable. Adoption of state law in such cases does not present a conflict with the federal policy or interest in protection of Indian tribes. Nor has any other court perceived the need for federal common law rules governing contract disputes between Indian tribes and non-Indians. The absence of the United States as a party to the litigation is also a factor in determining the need for a federal common law rule.

Id. at 715 (citations omitted).

By its decision today, the majority does violence to the spirit of this decision. *Gila River* established that just because an Indian contract must meet with certain requirements set forth in a federal statute does not mean that the federal courts have jurisdiction of any dispute arising under that contract. We noted in *Gila River* that the Indian tribe did not seek recovery for damage to their land, but rather sought "recovery of damages for failure to perform a construction contract." *Id.* at 714. Similarly, the Bands seek recovery for breach of the Tribal-State compacts, not violation of IGRA or any other federal law. Although IGRA regulates the formation of Tribal-State compacts to a certain degree, I see no reason for the federal courts to become the arbiter of any and all disputes that may arise out of such a compact.

The majority also suggests that jurisdiction of the Bands' compact enforcement claims can be found in § 2710(d)(3)(C)(v), which provides authorization for Tribal-State compacts to provide remedies for breach of contract. This provision, however, says nothing about federal court jurisdiction of these breach of contract claims. Although the majority is correct that the parties could agree to waive their respective immunities, a long line of authority establishes that federal jurisdiction may not be conferred by such an agreement if it does not independently exist. *See, e.g., Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) ("The parties have no power to confer jurisdiction on the district court by agreement or consent."); *see also* E. Chemerinksy, *Federal Jurisdiction* § 5.1, at 249 (2d ed. 1994) ("[F]ederal court jurisdiction cannot be gained by consent of the parties.").

Finally, as an alternative basis for jurisdiction, the majority asserts we have jurisdiction because the Bands are seeking to recover money taken by the State in violation of federal law. I cannot agree. As I view it, the Bands seek nothing more than the enforcement of their Tribal-State compacts. Paragraph 19 of the compacts calls for the State to pay the Bands the disputed license fees as a result of our decision in *Cabazon II*, where we held that the State's license fees were preempted by federal law. Despite the fact that our resolution of that question was based on federal law, the Bands' efforts to obtain a judgment ordering the State to pay over the disputed license fees do not "arise under" the laws of the United States. Instead, they rely only on the terms of their Tribal-State compacts.

We federal judges must jealously protect our increasingly limited resources by ensuring that we adjudicate only those matters that we are authorized to hear by Congress and the Constitution. Here, we unquestionably had federal question jurisdiction of the legal issue presented in the Bands' original complaint, *viz.*, whether the State's license fee on off-track betting was permissible under IGRA. However, when the district court failed to execute our instructions "to enter summary judgment for the Bands," *Cabazon II*, 37 F.3d at 435, this case began to present new and different issues of which we do not have jurisdiction. As a result, I respectfully dissent from the majority's decision to affirm the district court's order directing the State to pay the Bands' accumulated and future license fees.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, v. PETE WILSON, et al., Defendants.	CIV-S-90-1118 DFL MEMORANDUM OF OPINION AND ORDER (Filed Apr. 26, 1996)

Plaintiffs Cabazon Band of Mission Indians, Sycuan Band of Mission Indians, Viejas Band of Mission Indians and Barona Band of Mission Indians ("the tribes") each filed suit to recover past and future monies they claim are owed to them under compacts each entered with defendant, the State of California ("the State"), under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (1988) ("IGRA"). The compacts regulate satellite parimutuel horse race wagering on the tribes' lands.

The history of this action is somewhat involved. The action was first filed to resolve a dispute as to whether a licensing fee legally could be collected from the racing associations by the State or whether the fee was an impermissible tax. The tribes and the State had agreed to the terms of compacts governing simulcast wagering in all other respects and agreed to tender the licensing fee issue to the district court for resolution. The court ruled that the fee could be collected and that the State's willingness to "agree to disagree" so that a compact could be formed should not weigh in the analysis as to the legality of the

fee. The Ninth Circuit reversed, holding that the fee could not be collected in part because the State had agreed to pay over the fee to the tribes if the State lost the litigation. *See Cabazon Band of Mission Indians v. California*, 788 F. Supp. 1513 (E.D. Cal. 1992), *rev'd*, 37 F.3d 430 (9th Cir. 1994).

After the mandate issued from the Court of Appeals, the State threatened to shut down the simulcast signal and declined to pay the licensing fees to the tribes. This court issued a temporary restraining order on June 30, 1995, prohibiting the State from terminating the signal. On July 12, 1995, the court issued a further order in response to a motion by the tribes to enforce the compacts. In that order the court held: (1) subject matter jurisdiction exists under IGRA to enforce a tribal-state compact; (2) the Eleventh Amendment immunity to suit has been waived by the State in the compacts; and (3) the tribes must amend their complaints to seek relief from the State's alleged breach of the compacts.[1]

The tribes filed amended complaints alleging that the State is in breach of the compacts for failing to pay over to the tribes the licensing fee. The State answered, and the tribes together now move to strike the State's five affirmative defenses to their complaints, and to dismiss the State's three counterclaims. For the reasons stated below, the tribes' motion is granted.

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[1] The court also rejected the State's argument that the Ninth Circuit decision imposed an interpretation of the compacts so unexpected as to provide a basis for the State's withdrawal from the compacts.

I. Motion to Strike Affirmative Defenses

Rule 12(f) provides that the court may strike any "insufficient defense" from a defendant's pleading. The party moving to strike a defense as insufficient carries a heavy burden – it must establish that "there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial*, § 9:381 (1995). Although motions to strike are generally disfavored, "where the motion may have the effect of making the trial of the action less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike [legally insufficient defenses] will be well taken." *California ex rel. State Lands Commission v. United States*, 512 F.Supp. 36, 38 (N.D.Cal. 1981). While prejudice to the moving party may be a factor in considering a motion to strike, such a showing is not required: "the district court could properly grant the motion to strike for the purpose of streamlining the ultimate resolution of the action and focussing the jury's attention on the real issues of the case." *Fantasy v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds, Fogerty v. Fantasy*, 114 S.Ct. 1023 (1994); Schwarzer, *supra* at §§ 9:409-9:410.

A. Eleventh Amendment Immunity

The State's first affirmative defense asserts immunity from suit under the Eleventh Amendment. This contention has been resolved previously by the order of July 12,

1995. As found in that order, the State waived its immunity when it agreed to compact language laying venue in federal court for suits seeking interpretation or enforcement of terms of the compact. *See* July 12, 1995 order at 10.[2] The State makes no argument why the Eleventh

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[2] As stated in the July 12, 1995, order:

> The statute provides that a compact may provide "remedies for breach of contract." § 2710(d)(3)(C)(v). Here the compacts all include a provision that "Judicial review of any action taken by either party under this Compact, or seeking any interpretation of this Compact, shall be had solely in the appropriate United States District Court." Further, the compacts all include provisions that the compact shall remain in force unless "determined to be invalid by a court of competent jurisdiction," that either party may bring suit to amend the compact in a "court of competent jurisdiction"; and that "the compact shall be governed by and construed in accordance with the laws of the United States." These provisions provide for an action for breach of the compact in federal district court just as IGRA envisions. . . . [T]he court's jurisdiction is not limited by the Eleventh Amendment in the circumstances here. The State has waived its Eleventh Amendment immunity in the compact language cited above. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). The compact language clearly and unequivocally subjects the State to suit in federal district court. The *Port Authority* Court found waivers of the Eleventh Amendment where the states involved expressly submitted to suit in either state or federal district court. *Id.* at 307. Here the waiver is even more readily apparent, where the State agreed to suit in federal district court alone. The State's claim that the compacts only subject the State to suit for declaratory relief is not borne out by the compact language which

Amendment issue should be revisited at this point.[3] Accordingly, the State's first affirmative defense shall be stricken.

B. Implied Covenant Not To Violate IGRA

The State's second and fourth affirmative defenses derive from its assertion that the tribes are in violation of IGRA because they are engaging in class III gaming other than as provided for in the compacts.[4] Specifically, the State claims that the tribes have placed illegal slot machines in their gambling establishments.

The State acknowledges that the compacts are silent concerning class III gaming other than simulcast horse racing. Nonetheless, the State argues that an implied

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provides for judicial review of "any action taken by either party under this Compact." This sweeping language waives immunity for suit to enforce the compacts.

[3] The State requests a round of additional briefing in light of the Supreme Court's recent decision in *Seminole Tribe of Florida v. Florida*, 96 Daily Journal D.A.R. 3499 (March 27, 1996). In *Seminole Tribe*, the Court held that Congress lacked the authority to abrogate the states' eleventh amendment immunity from suits by tribes to compel good faith negotiation of tribal-state compacts, *see* 25 U.S.C. § 2710(d)(7)(A)(I). It appears that the holding in *Seminole Tribe* does not affect this case because here the State has affirmatively waived its Eleventh Amendment immunity in a compact it voluntarily entered into. However, should the State wish to argue otherwise it may do so in a motion for reconsideration.

[4] IGRA prohibits class III gaming on tribal lands, other than those class III games that are permitted and regulated by a tribal-state compact. 25 U.S.C. § 2710(d)(1).

promise by the tribes not to engage in any other class III gaming should be read into the compacts because such gaming is in violation of IGRA. On the basis of this implied promise, the State contends that the tribes are in material breach of the compacts and thus that the State is relieved of any obligation under the compacts, including the obligation to pay the tribes the licensing fee collected from the racing associations. The State makes the same kind of claim in slightly different legal garb by alternatively styling the tribes' alleged violations of IGRA as a failure of an implied precondition to the State's duty to perform under the compacts.

In so framing its defenses, the State would use the compacts as leverage from which to extend its regulatory control to other class III gaming not covered by the compacts. The State finds a basis for this extension in IGRA and argues that it is because of IGRA that the implied covenant or implied precondition not to engage in class III gaming should be read into the compacts. But IGRA gives to the State no authority to regulate the conduct of class III gaming on tribal lands other than what is provided for by compact.

Prior to IGRA, tribes had unfettered freedom to conduct class III gaming provided the state had not prohibited gambling entirely, *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); after IGRA tribes had no authority to conduct such gaming unless expressly sanctioned by a tribal-state compact, 25 U.S.C. § 2710(d)(1). Moreover, by entering such compacts, tribes necessarily assented to state regulation of matters governed in the compact. 25 U.S.C. § 2710(d)(7)(A). This regulatory authority had been denied to the states prior

to IGRA. By making a tribe's right to conduct class III gaming contingent upon its entering a compact with a state, and by granting the states authority to regulate class III gaming by use of the compact, IGRA expanded the states' role in governing matters of class III gaming on tribal lands. *See Seminole Tribe of Florida v. Florida*, 96 D.A.R. at 3503 ("It is true enough that [IGRA] extends to the States a power withheld from them by the Constitution") (citing *Cabazon*, 480 U.S. 202).

But while IGRA gave the states greater ability to regulate class III gaming through the device of a compact, it does not provide for any general regulatory authority on the part of the states beyond the compact. Instead, the states' enforcement authority is carefully limited to those specific matters covered in a tribal-state compact as to which the tribe has affirmatively ceded jurisdiction to the state. Thus, IGRA provides that "[t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State compact . . .* " 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). *Accord* 25 U.S.C. § 2710(d)(5) (tribes may regulate class III gambling unless in conflict with "State laws and regulations made applicable by any Tribal-State compact"). IGRA specifically provides that the compacts may allocate regulatory jurisdiction between the tribes and the states. *See* 25 U.S.C. § 2710(3)(C)(I) and (ii) (compact may include "provisions relating to – (I) the application of the criminal and civil laws and regulations of the Indian tribe or the State . . . ; (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe"). Beyond

those matters covered by compact, enforcement of IGRA's prohibitions remains the exclusive province of the federal government and of the tribes themselves. *See* 18 U.S.C. § 1166(d) (United States has exclusive right to prosecute violations of State gambling laws, applicable to class III gaming in Indian country, unless compact confers criminal jurisdiction to the State); 25 U.S.C. § 2713(d) (tribes regulatory authority over gaming establishments); 25 U.S.C. §§ 2704, 2713 (National Indian Gaming Commission created with authority to impose civil fines for gaming violations). *See generally, Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (state may not prosecute violations of state law involving class II and class III gaming on Indian lands).

The legislative history underscores this limitation on state power, as the Senate Committee on Indian Affairs took great pains to communicate its intent that the states' ability to regulate gaming be restricted to matters covered by the compacts. The Senate Committee stressed that IGRA must be understood in the context of the long history of tribal immunity from state criminal and regulatory jurisdiction, during which tribes fell under state jurisdiction only when, and to the extent that, they consented to it:

> It is a long and well-established principle of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of State governments and the application of State laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal

> governments before State jurisdiction can be extended to tribal lands.

S.Rep. 446, 100th Cong., 2d session (1988), U.S. Code Cong. & Admin. News 1988, pg. 3075. It was the Senate Committee's intent that IGRA not alter this balance of power. Thus, in order to give effect to the states' desire to regulate class III gaming on Indian lands while respecting the tribes' right to be free from unconsented-to state authority, the Senate Committee created the tribal-state compact as a mechanism under which tribes could elect to submit to limited state control in exchange for the ability to conduct class III gaming legally:

> [c]onsistent with these principles [of tribal sovereignty], the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities . . . The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-state compact.

Id. at 3075-76. According to the Senate Committee, the scope of state authority would be strictly limited by the terms of the compact, and the tribes would not be subject to any greater state jurisdiction than that to which they consented:

> [i]n no instance does [IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose . . . it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact . . . the relinquishment of such rights . . . shall not be construed . . . as a general abrogation of other reserved rights or of tribal sovereignty.

Id. See also id. at 3084 ("The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands"); *and* Additional Views of Mr. McCain, *id.* at 3103 ("I understand Senator Evans' concerns regarding the potential overextension of the intended scope of the Tribal/State compact approach . . . I believe it is important to again underscore the statement that appears on page 10 of the Report: 'The Committee does not intend to authorize any wholesale transfer of jurisdiction from a tribe to a state' ").

To infer a general covenant in the compacts by the tribes not to engage in gaming in violation of state law and IGRA, would be tantamount to finding a cession by the tribes of general regulatory authority to the State over class III Indian gaming in which the State's enforcement tool would be its threat to void or breach the compact. The text of IGRA, its legislative history and the historical context in which it was passed, all point to the opposite conclusion: that state authority over class III gaming reaches no further than the explicit terms of the tribal-state compacts. IGRA does not provide a basis from which the court may infer any promises by the tribes beyond those that are specifically provided for in the compacts.

For these reasons, the State's second and fourth affirmative defenses fail as a matter of law. The compacts do not include implied preconditions or implied covenants by the tribes to prohibit class III gaming on tribal lands other than as provided for in the compacts.

C. Unclean Hands

In its third affirmative defense, the State contends that under the doctrine of "unclean hands" the tribes are not entitled to the relief they seek because of their IGRA violations. The unclean hands doctrine is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Chitkin v. Lincoln National Ins. Co.*, 879 F.Supp. 841, 853 (S.D.Cal. 1995), *quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Machine Co.*, 65 S.Ct. 993 (1945). The unclean hands doctrine applies when (1) the plaintiff has engaged in wilful or fraudulent misconduct; (2) the plaintiff's wrongful conduct is related to the controversy in issue; and (3) the defendant has suffered serious harm as a result of the plaintiff's wrongful actions. *Chitkin*, 879 F.Supp at 854.

Equitable defenses such as unclean hands are generally available in actions governed by federal common law. *See e.g., Ellenburg v. Brockway, Inc.* 763 F.2d 1091, 1097 (9th Cir. 1985) (unclean hands defense applied in ERISA action). However, in fashioning a federal common law of equitable defenses in areas of law controlled by complex federal statutory schemes, a court must define the scope and limitations of such defenses keeping in mind the

federal policies underlying the statutory scheme. *See AM International Inc. v. International Forging Equipment*, 743 F.Supp. 525, 531 (N.D.Ohio 1990) (no unclean hands defense in CERCLA actions because it would contradict statutorily-created joint and several liability among joint tortfeasors), *citing Mardan Corp. v. C.G.C. Music Co.*, 804 F.2d 1454 n.3 (9th Cir. 1986). *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 77 S.Ct. 912, 918 (1957) (in creating federal common law, court must be guided by principles and policies of controlling federal statute); 11 B. Witkin, *Summary of California Law*, Equity § 13 (9th Ed. 1990) (defense of unclean hands should not be recognized where result would be contrary to public policy).

In light of the strong federal policy to limit the reach of state authority over tribal affairs to matters specifically covered in the tribal-state compact, the State's unclean hands defense fails. Enforcement of IGRA's prohibition against class III gaming that is not covered by a compact is a matter solely within federal control where, as here, the compacts are silent on the subject. As with the claim of implied covenants discussed above, to allow the State to assert alleged illegal class III gaming as an equitable defense would be, in effect, to extend state regulatory authority over matters as to which the Congress has denied the states jurisdiction except through the compact and the agreement of the tribes. Accordingly, the State's third affirmative defense shall be stricken.

D. Failure to Join Indispensable Parties

As its fifth affirmative defense the State asserts that the tribes have failed to join indispensable parties, namely, the racing association and horsemen who would retain the licensing fees were the tribes to loose [sic] their breach of compact claim against the State. Rule 19 requires joinder of additional parties if (1) in the absence of that additional party, "complete relief cannot be accorded among those already parties," Fed.R.Civ.P. 19(a)(1), or (2) the additional party claims an interest relating to the subject of the action, and proceeding in that party's absence may impede its ability to protect that interest or leave any persons already parties subject to substantial risk of incurring double or inconsistent liabilities, Fed.R.Civ.P. 19(a)(2).

The State's affirmative defense under Rule 19(a)(1) falters because the State does not demonstrate that the tribes will be unable to achieve all the relief they seek in the absence of the nonjoined parties. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (Rule 19(a)(1) argument fails if plaintiffs can receive all relief they seek without absent parties). The Ninth Circuit has ruled that the tribes are entitled to the license fee monies under the terms of the compacts, and that the terms of the compacts control over state law. *See Cabazon*, 37 F.3d at 434. The tribes therefore will be able to obtain the relief they seek from the State under the terms of the compacts notwithstanding any grievance the racing association and horsemen may have against the State under state law.

The defense fails under Rule 19(a)(2) as well. First, there is no indication that the racing association and

horsemen have claimed any interest in this litigation, despite having had many years to do so. *See De Wit v. Firstar Corp.*, 879 F.Supp. 947, 995 (N.D.Iowa 1995) (no Rule 19(a)(2) defense where absent party fails to assert interest in litigation). Moreover, the State does not explain how its interests or those of the absent parties will be prejudiced by proceeding with only those parties currently before the court. This is not a case involving a limited fund to which several parties have made a claim. Rather, the State has incurred a contractual obligation to the tribes to pay over certain monies collected as license fees from the racing association and horsemen. The State argues that taxing the racing association and horsemen and paying those monies to the tribes may violate state law. Even if it does, however, the State's contractual obligation to the tribes will remain, *see Cabazon Band of Mission Indians v. California*, 37 F.3d 430, 434 (9th Cir. 1994) (compact terms prevail over state law), and the racing association and horsemen will be free to pursue any grievance they may have against the State in a separate action if they so choose. The State does not show that the result of this case may impair the absent parties' ability to do so.

Because the State has not advanced valid grounds for requiring joinder of indispensable parties under Rule 19(a), its fifth affirmative defense is stricken as a matter of law.

II. The State's Counterclaims

The State asserts three counterclaims against the tribes. The first is for a declaration that the tribes are

conducting class III gaming in violation of the compacts, and an order enjoining such activity. The second is for a declaration that the tribes have materially breached their obligations under the compacts and as such have excused the State's performance. The third is for a declaration that the compacts are void as unenforceable and for a declaration that the State never promised to pay over license fees that were determined to fall on the racing association and horsemen.

The tribes argue that they are immune from suit by the State on all three counterclaims. However, in the compacts the tribes stipulated to federal court jurisdiction as follows: "Judicial review of any action taken by either party under this Compact, or seeking an interpretation of this Compact, shall be had solely in the appropriate United States District Court." *See* Barona Band Compact at ¶ 18. Because each of the State's counterclaims seeks review of actions taken under the compact or interpretation of compact terms, the above venue provision constitutes a waiver of the tribes' immunity from suit on those counterclaims. *See McClendon v. United States*, 885 F.2d 627, 629-30 (9th Cir. 1989) (tribes may waive sovereign immunity by clear expression of intent to do so; scope of waiver defined by terms of consent).

While the tribes' sovereign immunity argument is not well taken, the State's counterclaims fail to state a claim and must be dismissed under Fed.R.Civ.P. 12(b)(6). The first counterclaim asks for a declaration that the tribes are violating the compacts by engaging in unauthorized gaming, and seeks an injunction against future violations. However, as explained above, the compacts contain no

such implied promises and to read them into the compacts would violate the policy and language of IGRA. Further, the State's authority to seek injunctions under 25 U.S.C. § 2710(d)(7)(A)(ii), is restricted to suits to enjoin class III gaming that is in violation of the terms of a tribal-state compact. The State therefore has no basis for seeking the requested injunctive relief and declaratory relief. This counterclaim must be dismissed as a matter of law.

The second counterclaim seeks a declaration that the tribes materially breached their obligations under the compacts by violating IGRA. Because the tribes made no such promise, express or implied, this counterclaim must be dismissed as well.

The State's third counterclaim seeks two declarations. First, the State requests a declaration that when it entered the compacts it agreed to pay the license fee monies to the tribes only if the court determined that the burden of the fees fell directly upon the tribes themselves, and not on the racing association and horsemen. This claim is foreclosed by the opinion of the Ninth Circuit. The compacts provide that the State will pay over to the tribes all past license fees collected, and an amount equal to the license fees in the future, should the court determine that "the state license fee is impermissible under the Act." *See* Cabazon Compact at ¶ 19(B)(1) & (3). The Ninth Circuit has determined that the State's license fee scheme as applied to the tribes through the compacts is impermissible under IGRA. *Cabazon*, 37 F.3d at 433-35. It follows that the State must pay the fee to the tribes as provided by the compact. The State's request for declaratory relief amounts to an attempt to relitigate the appeal and to re-

write the compacts to avoid the effect of the Ninth Circuit's decision.

Second, citing the Ninth Circuit's *Cabazon* decision, the State asks for a declaration that the compacts are void under IGRA because the racing associations and horsemen receive more revenue from the simulcast wagering on tribal lands than do the tribes, and as such the tribes are not the "primary beneficiar[ies]" of the wagering activity. This argument misconceives IGRA and draws an inaccurate parallel between the licensing fee and revenue earned by the racing associations and horsemen.

The tribes and the State left unresolved in their compacts whether under IGRA and general principles of Indian law, the licensing fee at issue could be levied and retained by the State. Had the tribes and the State reached agreement on the matter there would have been no litigation and no violation of IGRA. Here there is no dispute in the compacts that the horsemen and racing associations may receive their customary take from the gambling proceeds. This revenue is not an assessment by the State on the horse racing activity, and in any event it has been agreed to as part of the compacts. There is no violation if IGRA.

The State's requests for declaratory relief in its third counterclaim fail as a matter of law.

III. Conclusion and Order

For the foregoing reasons, the tribes' motion to strike is GRANTED as to all affirmative defenses, and the

tribes' motion to dismiss is GRANTED as to all counterclaims. The State shall report to the court within 14 days of the date of this order as to how it shall comply with the compacts in light of the ruling by the Court of Appeals.

IT IS SO ORDERED.

Dated: 26 April 1996.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al.,

Plaintiffs,

v.

PETE WILSON, as Governor for the State of California, et al.,

Defendants.

CIV-S-90-1118 DFL

MEMORANDUM OF OPINION AND ORDER

(Filed Jul. 11, 1996)

Southern California Off-Track Wagering, Inc., Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and Los Angeles County Fair move for leave to intervene as defendants in this action.[1] The motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation. Accordingly, the motion is DENIED as untimely. Fed.R.Civ.P. 24; *Engra, Inc. v. Cabal*, 958 F.2d 643, 644-45 (5th Cir. 1992).

[1] Because oral argument would not be of material assistance this matter is submitted on the briefs. E.D.Cal. Local Rule 230(h).

IT IS SO ORDERED.

Dated: 10 July 1996.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, v. PETE WILSON, et al., Defendants.	CIV-S-90-1118 DFL MEMORANDUM OF OPINION AND ORDER (Filed Jul. 19, 1996)

Defendants raise several arguments in support of their motion for reconsideration of the court's order of April 26, 1996, in which the court granted the plaintiffs' motion to strike and to dismiss. Finding none of the arguments persuasive, the court denies the motion.[1]

Defendants first argue that the court's conclusion that the State has waived its Eleventh Amendment immunity must be reconsidered in light of the United States Supreme Court's recent opinion in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). In *Seminole*, the court held that Congress, acting on the basis of its power to regulate Indian commerce, lacks authority to abrogate the states' immunity under the Eleventh Amendment. In this case, however, under the terms of the compact, the State has expressly consented to federal court jurisdiction, and therefore has waived its Eleventh Amendment immunity.

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[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D.Cal. Local Rule 230(h).

See Order or April 26 at 4-5. The State contends that it should be relieved of the effect of its waiver because it made the waiver under the assumption, now rejected in *Seminole*, that Congress properly abrogated the states' Eleventh Amendment immunity in passing IGRA. However, the State was on notice when it negotiated the compacts that the issue of Congress's power to abrogate was unsettled; indeed, several states chose to challenge the federal courts' jurisdiction to entertain suits brought against them under IGRA rather than assent to such jurisdiction. California could have made a similar challenge, or otherwise provided in the compacts for a contingency such as that presented by the *Seminole* decision, but it chose not to do so. The State's attempt to extricate itself from its waiver, on the grounds that such waiver was made under "duress," must be rejected.

The State next argues that the Ninth Circuit's recent decision in *Crow Tribe of Indians v. Racinot*, U.S.App. LEXIS 14517 (9th Cir., June 14, 1996) compels reconsideration of the court's conclusion that the State is not authorized under IGRA to enjoin or regulate class III gaming activities on tribal lands when those activities are not addressed in a tribal-state compact. In *Crow*, the Crow Tribe challenged state and federal agents' confiscation of mechanical slot machines from a casino on the Crow Tribe reservation. In concluding that the enforcement action was valid, the Ninth Circuit held that (1) the tribal gaming commission lacked the authority to interpret the tribal-state compact as authorizing the use of mechanical slot machines; (2) the tribal-state compact did not permit the use of mechanical slot machines; (3) the federal and state authorities' search and seizure did not violate the

Fourth Amendment; and (4) the Crow tribe's due process claim failed because it lacked a property interest in the operation of mechanical slot machines. *Id.* at 4-7.

The *Crow* opinion neither holds nor suggests that a state may on its own accord, and without federal involvement, hold or regulate uncompacted class III gaming or void a compact because of such unauthorized gaming. Indeed, in *Crow* the State of Montana prevailed upon *federal* authorities to put an end to uncompacted class III gaming on tribal lands. *Id.* at 4. The State of California may seek to do the same here.

Next, the State repeats its argument that the tribes had an affirmative duty under the compact to seek amendment of the compact if they believed that "subsequent changes in state or federal law may affect the scope of [] permissible activities." Compacts, ¶ 11(A). However, this compact provision has no bearing on the current dispute because the tribes have never relied upon "changes in applicable law" in responding to the State's allegations that the tribes are conducting illegal class III gaming on tribal lands. This provision cannot reasonably be read to grant to the State the authority to regulate class III gaming on tribal lands, authority denied to them under IGRA absent a clear accession on the part of the tribes.

The State next argues that it is inconsistent for the court to infer a cause of action on the part of the tribes to enforce the negotiated compact as against the State, but refuse to infer a cause of action on the part of the State to redress the tribes' alleged conduct of uncompacted class III gaming. But implying a cause of action to enforce a

negotiated compact under which the State has consented to suit in federal court does no violence to the policies of IGRA and of federal Indian law in general. However, to allow the State to sue to redress gaming activities that are not addressed in a tribal-state compact would violate a fundamental tenet of federal Indian law: Indian tribes may not be subjected State regulatory authority without their assent. *See* Order at 7-11.

Finally, the State contends that the Ninth Circuit's *Cabazon* opinion does not support the granting of summary judgment for the tribes because the *Cabazon* court did not conclude that the license fee was impermissible under IGRA. The appellate court did, however, hold just that: "[t]he express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee . . . [w]e conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands." *Cabazon*, 37 F.3d 430, 435 (9th Cir. 1994). The Ninth Circuit concluded its opinion with an express directive to this court to "enter summary judgment for the Bands." *Id*. The State again asks this court to accept arguments that would place the court in conflict with the directions of the appellate court and a fair reading of its opinion.

The motion for reconsideration is DENIED and summary judgment is now awarded to the tribes. Within 14 days of this order the State shall pay over to the tribes the monies that have been assessed as a license fee on parimutuel offtrack wagering at the plaintiffs' simulcast facilities. The tribes may seek interest, if appropriate, by post-judgment motion.

The court will not stay this order.

IT IS SO ORDERED.

Dated: 18 July, 1996.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe; SYCUAN BAND OF MISSION INDIANS; Plaintiffs-Appellees, BARONA BAND OF MISSION INDIANS, a federally-recognized Indian tribe a/k/a Barona Group of Capitan Grande Band of Mission Indians, Plaintiff-Intervenor-Appellee, VIEJAS BAND OF MISSION INDIANS, Intervenor-Appellee, v. PETE WILSON, Governor of the State of California; STATE OF CALIFORNIA; CALIFORNIA HORSE RACING BOARD, Defendants-Appellants. SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC.; DEL MAR THOROUGHBRED CLUB; HOLLYWOOD PARK, INC.; LOS ANGELES TURF CLUB; OAK TREE RACING ASSOCIATION; LOS ANGELES COUNTY FAIR; LOS ALAMITOS RACE COURSE, Applicants in Intervention-Appellants.	Nos. 96-16432 96-16443 D.C. No. CV-90-01118-DFL ORDER (Filed Jan. 14, 1998)

Before: WIGGINS, NOONAN, and TROTT, Circuit Judges.

Judges Noonan and Trott have voted to deny the petition for rehearing, and to reject the suggestion for rehearing en banc. Judge Wiggins has voted to grant the petition for rehearing and recommends granting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe; SYCUAN BAND OF MISSION INDIANS;	Nos. 96-16432 96-16443
Plaintiffs-Appellees,	D.C. No. CV-90-01118- DFL
BARONA BAND OF MISSION INDIANS, a federally-recognized Indian tribe a/k/a Barona Group of Capitan Grande Band of Mission Indians,	ORDER
Plaintiff-Intervenor-Appellee,	(Filed Jan. 28, 1998)
VIEJAS BAND OF MISSION INDIANS,	
Intervenor-Appellee,	
v.	
PETE WILSON, Governor of the State of California; STATE OF CALIFORNIA; CALIFORNIA HORSE RACING BOARD,	
Defendants-Appellants.	
SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC.; DEL MAR THOROUGHBRED CLUB; HOLLYWOOD PARK, INC.; LOS ANGELES TURF CLUB; OAK TREE RACING ASSOCIATION; LOS ANGELES COUNTY FAIR; LOS ALAMITOS RACE COURSE,	
Applicants in Intervention-Appellants.	

TROTT, Circuit Judge:

Defendants-Appellants State of California, Governor Pete Wilson, and the California Horse Racing Board's motion for a stay of the mandate is GRANTED for 60 days from the date of this order so that it may file a petition for a writ of certiorari.

788 F. SUPP. 1513 printed in FULL format.

CABAZON BAND OF MISSION INDIANS, and the SYCUAN BAND OF MISSION INDIANS, Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.

Civ. S-90-1118-DFL

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

788 F. Supp. 1513; 1992 U.S. Dist. LEXIS 4239; 92 Daily Journal DAR 16096

March 31, 1992, Filed

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JUDGES: LEVI

OPINIONBY [sic]: DAVID F. LEVI

OPINION:

ORDER

The Cabazon and Sycuan Bands of Mission Indians (the "Tribes") seek a determination that the State of California cannot impose license fees on its on-reservation betting facilities for simulcast horse racing. The Tribes argue that the license fees are a direct tax on them that is barred by the Indian Gaming Regulatory Act ("IGRA") and the doctrine of tribal sovereign immunity. California asserts that the license fees are permissible under IGRA because the fees do not constitute a direct tax on the Tribes. Both parties move for summary judgment. The State's motion is granted and the Tribes' motion is denied.

I

The Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721, authorizes Indian tribes to conduct gaming activities that are permitted in the state in which the tribes' lands are located. The purpose of permitting Indian tribes to run gaming operations is to promote tribal economic development, self-sufficiency, and strong tribal governments. 25 U.S.C. § 2702(1). IGRA classifies gaming into three different categories and permits varying degrees of tribal, state, and federal regulation. Class I gaming, which involves social games for prizes of minimal value, is within the exclusive jurisdiction of the Indian tribes and is not subject to state or federal regulation. 25 U.S.C. §§ 2703(6) and 2710(a). Class II gaming, which includes bingo and some card games, is within the jurisdiction of the tribes, but is also subject to federal regulation. 25 U.S.C. § 2703(7)(A)-(D), § 2710(2).

Class III gaming, which includes all gaming not covered by Classes I & II, is permissible only if it is: (1) authorized by a resolution of the tribe's governing body; (2) approved by the Chairman of the National Indian Gaming Commission; (3) located in a state that permits that type of gaming; and (4) conducted pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1). Off-track betting at simulcast wagering facilities is Class III gaming under IGRA. (Stipulated Statement of Facts ("SSF") at P10.)

Unlike Class I and II gaming, IGRA provides that Class III gaming will be subject to extensive state regulation. The states have a greater interest in regulating the more sophisticated types of gaming covered by Class III because most participants will be non-Indians, and there is a significant risk of infiltration by criminal elements. See 134 Cong. Rec. H8146-01. Because of the importance of the states' interests affected by Class III gaming, and because of the extensive state regulation of Class III gaming, IGRA requires that tribes and states negotiate tribal-state compacts which govern many aspects of the conduct of the gaming.

IGRA contemplates a highly flexible compact negotiation process, in which the states and tribes may agree upon a multitude of issues related to the conduct of Class III gaming. IGRA provides that tribal-state compacts may contain provisions covering, inter alia, questions such as the application of criminal and civil laws related to gaming regulation, allocation of jurisdiction over criminal

and civil matters, state taxation to cover costs of regulation, and remedies for breach of contract. See 25 U.S.C. § 2710(d)(3)(C)(i)-(vii).[1]

II

California permits horse racing enthusiasts to bet on races both at the track where the races are conducted and at off-site facilities. Off-track betting is conducted at facilities that receive a simultaneous satellite transmission of live races. The off-track facilities are electronically connected to the originating tracks so that the bets placed at

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[1] The Act provides for jurisdiction in the federal district courts to entertain a suit by an Indian tribe when the tribe and the state are unable to negotiate a compact. In such actions, the tribe must introduce evidence that the state did not respond to the tribe's request to negotiate a compact or did not respond in good faith. 25 U.S.C. §§ 2710(d)(7)(A) & (7)(B). Upon the introduction of such evidence, the burden of proof is on the state to prove it negotiated in good faith:

> In determining . . . whether a State has negotiated in good faith, the court –
>
> (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

25 U.S.C. § 2710(d)(7)(B)(iii).

In this case, plaintiffs do not argue that the State has acted in bad faith and thus do not invoke 42 U.S.C. § 2710(d)(7)(A) to establish the court's jurisdiction. The court has jurisdiction of this action under 28 U.S.C. § 1362, which provides for federal court jurisdiction over all civil actions involving Indian tribes.

the off-track facilities are part of the parimutuel[2] betting pool. (SSF at P12.) The California Horse Racing Board approves the off-track betting facilities, which are known as "simulcast" or "satellite" wagering facilities. Id. Racing associations, composed of the operators of live races, can form organizations to transmit the audio-visual signal and administer the parimutuel betting operations at simulcast facilities. Id.

California has an extensive statutory scheme for regulating and taxing horse racing and off-track betting at simulcast satellite wagering facilities. The statutory plan provides for the distribution of all money wagered that is not paid out to bettors. The money is allocated in predetermined percentages to California, simulcast facility operators, racing associations composed of operators of live races, and various other public and private entities. In order to finance the cost of regulation by the state horse racing board and to raise revenues, California requires that between one-and-a-half and four percent of the amount wagered at simulcast facilities be paid to the state as license fees. Cal. Bus. & Prof. Code § 196111. Additional license fees payable to the state are provided for by sections 19606.5 and 19606.6. The racing associations are responsible for paying the license fees to California. Cal. Bus. & Prof. Code §§ 19605.7(i) & 19605.71(d). Any monies left over are paid to the racing associations and the horsemen who participate in the races. Cal. Bus. & Prof. Code §§ 19605.8 & 19606.

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[2] In pari-mutuel betting, those who bet on the winner share the total stakes minus a small percent for the management.

III

The Tribes entered into compacts with California to operate simulcast wagering facilities on their reservations, pursuant to 25 U.S.C. § 2710(d).[3] The compacts have been approved by the Assistant Secretary of the Interior and published in the Federal Register, as required by 25 U.S.C. § 2710(d)(2)(B). (SSF at PP21-22.) Both Tribes are presently operating simulcast wagering facilities on their respective reservations under agreements with the racing associations. SSF at P23.

The Tribes are entitled to keep 2.33% of the total wagers placed at their facilities, pursuant to their compact with California. All off-track facilities retain 2% as a commission, and pay .33% to the local government entity. The tribes keep both the 2% ordinarily payable to the facility operator, and the additional .33% as the local government entity. (SSF at P24.) Thus, the Tribes receive the same revenue paid to non-Tribe simulcast operators plus the same revenue paid to non-Tribe local governments.

The Cabazon Band's simulcast wagering facility generated nearly $300,000 in license fees for California between March 1, 1990, and February 28, 1991. (SSF at P25.) The license fees were collected from the racing association that operated the live race, based on the amount wagered at the reservation. The state horse racing board's actual costs in monitoring the Cabazon

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[3] The parties agree that the lands of both Tribes' reservations are "Indian lands" within the meaning of 25 U.S.C. § 2703(4).

Band's operation during this period totaled $13,808. (SSF at P32.) The Cabazon Band itself retained $217,000 during the same period. (SSF at P26.)

From November 1, 1990 to March 31, 1991, the Sycuan Band's simulcast wagering facility generated over $440,000 in license fees for the State. (SSF at P27.) Again, the license fees were not collected directly from the Tribe but from the racing associations, based on the revenues generated by the simulcast facility located on the reservation. The horse racing board's actual costs in monitoring the Sycuan Band's operation during this period totaled $8,895. SSF at P33. The Sycuan Band itself retained $318,000 during the same period. SSF, P26.

While negotiating the compacts, the parties disagreed about whether California has jurisdiction to collect its license fee based on revenues generated at the Tribes' simulcast operations. As noted above, such fees are collected by law from the racing associations, based on wagering revenues – including simulcast wagers – generated by the associations' races. See Cal. Bus. & Prof. Code §§ 19605.71(a)-(b), 19606.5, and 19606.6. The parties agree that these fees are taxes, even though they are called "license fees." SSF at P16. The Tribes argue that the license fees are impermissible because they reduce the amount that the Tribes would collect from the simulcast enterprise, and so constitute a direct tax.[4] California

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[4] During the course of negotiating the compacts, California and the Tribes agreed that if there is a final judicial determination that the license fees are impermissible under IGRA, all license fees previously collected by California will be returned to the Tribes. In the future, the Tribes would be entitled

asserts that because the license fees are paid by the racing associations, the racing associations are the entities burdened by the tax, not the Tribes. The Tribes and California agreed that the Tribes would seek judicial resolution of this question, which is the sole issue before the court.

IV

The first source of guidance as to whether the license fees are permissible is IGRA itself. The Tribes contend that IGRA's extensive regulatory provisions preempt the State's jurisdiction to tax Indian gaming. IGRA explicitly addresses what type of direct state taxation is permissible. Tribal-state compacts may provide for a State tax on Indian gaming activities to the extent necessary to raise revenues to cover the costs of regulating the gaming. 25 U.S.C. § 2710(d)(3)(C)(iii). The compacts may also permit the Tribes to tax gaming "in amounts comparable to amounts assessed by the State for comparable activities." 25 U.S.C. § 2710(d)(3)(C)(iv). IGRA also provides that:

> Except for any assessments that may be agreed to [to permit the state to recover its costs of regulation], nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe . . . engaging in a class III activity.

25 U.S.C. § 2710(d)(4). These subsections, read together, constitute a prohibition on direct taxation of revenues generated

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to receive "an amount equivalent to the state license fee from all wagers at the [Tribes'] simulcast wagering facility." (Tribal Compacts at P19(A)(3).)

by tribes, other than that necessary to reimburse the state for the cost of its regulatory activities. This prohibition is echoed by IGRA's instruction that courts shall "consider any demand by the State for direct taxation of the Indian tribe . . . as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II) (emphasis added).

However, IGRA consistently speaks only to direct taxation. The dispute in the present case is over whether the license fees, which are levied on the racing associations and which affect the Tribes only indirectly, are an impermissible burden on the Tribes. The language of the Act is silent as to the legality of a uniform tax imposed on non-Indian entities who contract with Indian tribes. Congressional silence "no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 109 S. Ct. 1698, 1707, 104 L. Ed. 2d 209 (1989).

Because the language of the statute does not directly address the issue, it is appropriate to consult the legislative history for guidance. The legislative history of the Act strongly suggests that Congress did not intend to preempt the license fees the State seeks to collect from the racing associations. A primary purpose of IGRA was to create an arena in which Indian tribes could compete on an equal footing with non-Indian entities, "to achieve a fair balancing of competitive economic interests." Senate Report No. 100-446 at 3071. The Act seeks to provide "free market competition" between Indian gambling operations and other State-licensed gaming enterprises. Id. at 3083.

In addition, the Act seeks uniformity in the regulation of Indian and non-Indian gaming activities:

> This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.

Id. at 3076.

Finally, through the compact process, Congress sought to leave to the states and the tribes the authority to adjust their mutual interests in Class III gaming. Congress recognized revenue collection as a legitimate state interest:

> State and Tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. . . . A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Id. at 3083; see id. at 3084 (states may reject Indian gaming if negative economic consequences outweigh benefits). Congress' intent to establish an equal footing for competing tribal and non-Indian gaming enterprises, to provide for uniform regulation, and to permit the States

to achieve certain economic goals indicates that, except for direct state taxation, Congress did not intend to preempt the state tax at issue here. California seeks to treat revenue generated by racing associations on Indian lands in precisely the same fashion as revenue generated on non-Indian lands. Such a tax furthers the twin goals of equality and uniformity in regulation. Finally, preemption would deprive the State of substantial revenues traditionally collected from pre-existing racing association activities. Congress intended that the states and tribes would reach some accommodation on this issue through the compact process; it did not intend to bar the State from collecting a generally imposed tax on racing associations for all of their activities whether on Indian or non-Indian lands.

In short, based on the Act's silence as to indirect taxation, and Congress' intent that Class III tribal gaming be treated equally to non-Indian gaming, the court finds that IGRA does not preempt the tax at issue here.

V

The Tribes argue that even if IGRA does not preempt the State's licensing fees, the tax is still invalid as an impermissible intrusion on the Tribes' sovereignty. The Tribes argue that under general principles of federal Indian law, the tax is preempted. Although the strict prohibition against direct taxation of Indian tribes is well settled, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 116 L. Ed. 2d 687, 112 S. Ct. 683 (1992), the more difficult area for the federal courts has been taxation of entities and individuals who

conduct business with Indian tribes. "[F]ederal pre-emption is not limited to cases in which Congress has expressly – as compared to impliedly – pre-empted the state activity." Cotton Petroleum, 109 S. Ct. at 1707. In order to determine when there is an implied preemption of state regulation or taxation, the courts have developed a balancing test which weighs the conflicting state, federal and tribal interests. Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 659 (9th Cir. 1987), cert. denied, 494 U.S. 1055, 108 L. Ed. 2d 763, 110 S. Ct. 1523 (1990) (citing Cotton Petroleum, 109 S. Ct. at 1707.) The following factors are relevant to the balancing of these interests to determine if such taxes impermissibly interfere with federal or tribal interests: (1) the economic and administrative burden on the tribe; (2) the extent and cost of state regulation, and state services provided; and (3) the nature of the taxed tribal activity. The court will review each of these factors in turn as it relates to the present dispute.

VI

The fiercest point of disagreement between the Tribes and California is over the economic impact of the license fees on the Tribes. California argues that because the state statutory scheme provides for the distribution of any monies not retained by the off-track betting facilities or paid to the State, the Tribes have no legal right to the license fees even if California is barred from collecting them. If the Tribes as simulcast operators have no entitlement to the fees, there is no economic burden to the Tribes of having a third party, here the racing associations, turn over the fees to California.

In response, the Tribes rely on the State-Tribal compacts, which provide that if the license fees are found to be an impermissible tax, the Tribes will receive fees collected in the past, and will be entitled to collect future license fees. The Tribes argue that because they will be deprived of additional revenue if the license fees are upheld by this court, they are burdened economically by the fees.

The court is not in agreement with the Tribes' circular view of the effect of the State-Tribal compacts. In the compacts, California conceded only that if the court finds the tax invalid, it would pay over to the Tribes any monies collected and would allow the Tribes to retain that revenue in the future. The State plainly did not concede that the tax imposed a burden on the Tribes. The compacts contemplate that the possible invalidity of the tax will be determined by considering factors independent of any settlement agreement the parties may have as to the effect of the court's ruling. Any other approach could lead to inconsistent results, depending on the particular settlement agreement between the State and the Tribe. The only question for the court is whether the license fees burden the Tribes, and not whether a decision adverse to the Tribes could have economic consequences because of a settlement agreement. In evaluating the economic impact of the license fees, the court looks to the state provisions for assigning the right to receive revenues from the off-track facilities, as well as any negative effect on the Tribes' ability to compete with non-Indian facilities.

State law places the duty to pay the license fees on the racing associations.[5] Cal. Bus. & Prof. Code §§ 19605.7(i) & 19605.71(d).[6] If California cannot tax the revenues derived from betting at simulcast facilities located on the Tribes' lands, these revenues would be distributed 50% to the racing associations and 50% as purses to horsemen who participate in the races. Cal. Bus. & Prof. Code §§ 19605.8 & 19606. Because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes.

Furthermore, payment of the license fees does not harm the Tribe's economic interest by making gaming activities more expensive and less attractive to the Tribe's patrons. There is no evidence before this court that payment of the tax reduces the Tribes' ability to market their gaming operations. Compare Crow Tribe of Indians v. Montana, 819 F.2d 895, 899 (9th Cir. 1987), aff'd, 484 U.S. 997, 98 L. Ed. 2d 638, 108 S. Ct. 685 (1988) (coal tax imposes economic burden on tribe by increasing costs to coal producers and reducing royalties paid to tribe). The license fees do not render betting at the Tribes' operations

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[5] Although the legal incidence of the tax is not dispositive, the Supreme Court has upheld a regulation requiring Indian tribes to collect sales tax where the legal incidence of the tax fell on the purchasers, and not on the tribes. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481, 48 L. Ed. 2d 96, 96 S. Ct. 1634 (1976).

[6] These sections provide: "Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section."

less profitable for the bettors – indeed, there is no evidence whatsoever that the Tribes's ability to attract customers has been adversely affected by payment of the license fees. In the absence of the license fees, the tribes would not be able to offer bettors a higher payout on their wagers because the amount winners receive is determined by total wagers in the betting pool.

The Supreme Court has also recognized administrative burden as a factor in determining whether Indian tribes can be required to collect taxes when the legal incidence of the tax falls on the consumer of the tribes' product. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 112 L. Ed. 2d 1112, 111 S. Ct. 905, 911 (1991). The prohibition against imposing direct taxes on Indian tribes "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." Id. In the present case, there is no additional administrative burden placed on the Tribes by collection of the monies ultimately used by the racing associations to pay the license fees. Under state law, the Tribes must turn over to the racing associations all monies received from wagering except for the percentage they are entitled to as simulcast facility operators.

In sum, there is no economic burden placed on the Tribes by the license fees because they do not pay the fees, and the fees do not make their product less attractive, thereby reducing the profitability of the tribal operations. Additionally, there is no administrative burden imposed by the requirement that the Tribes collect the wagers which are later used by the racing associations to pay the license fees. The absence of economic and administrative burdens weighs in favor of finding the license

fees a permissible indirect tax on the activities of the Tribes.

VII

The extent and cost of state regulation as well as the nature of the services provided by California all favor permitting the license fees. California has an extensive state regulatory scheme for off-track betting, expends funds to regulate the taxed activity, and provides services directly related to the taxed activity.

The extent of state regulation is an important factor in determining the state's ability to tax the regulated activity. Where states have attempted to tax tribal activity and have not otherwise regulated the activity, the federal courts have stricken the proposed tax. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 65 L. Ed. 2d 665, 100 S. Ct. 2578 c (1980), the Court held that where the state does not regulate the taxed activity and has no duties or obligations to the tribes related to the taxed activity, state taxation is preempted. Furthermore, the Court noted in invalidating the tax that it was undisputed that the economic incidence of the tax would ultimately fall on the tribes. Similarly, in Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982), the Court refused to permit New Mexico to impose a tax related to school construction on the tribe's reservation:

> Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme

> intended to provide this education – a scheme which has "left the State with no duties or responsibilities." Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.

Id. at 843 (quoting Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691, 14 L. Ed. 2d 165, 85 S. Ct. 1242 (1965)); cf. Hoopa Valley, 881 F. 2d at 660 (timber yield tax impermissible where state has "no role" in regulating sale of tribal timber).

Where there is active state regulation, in contrast, the Supreme Court has permitted taxation of the regulated activity. A severance tax imposed on production of oil and gas by non-Indian lessees of wells on tribal land was upheld in Cotton Petroleum, in part because of state involvement in regulating oil and gas production. The Court distinguished Ramah and Bracker, noting that New Mexico provided extensive services to the tribes related to the oil and gas production, and that no state services had been provided in Ramah and Bracker. The Court also distinguished those cases because it found that the tax was not an economic burden on the tribe, unlike the taxes in Ramah and Bracker, which reduced the profitability of the tribes' activities.

The Cotton Petroleum Court also rejected the tribe's argument that the tax was impermissible because the value of the state services received by the tribe was considerably less than the revenue the state received from the disputed tax. The Court first noted that it was not possible to accurately value the benefit of the services provided by New Mexico to the tribes because of the

intangible benefits of membership in the state community. Second, the Court found "no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer – or by those living in the community where the taxpayer is located – must equal the amount of its tax obligations." Id. at 1714 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491, 94 L. Ed. 2d 472, 107 S. Ct. 1232 n.21 (1987)).

In light of the principles of Ramah, Bracker, and Cotton Petroleum, the court finds that the extent of the State's regulation of Class III gaming favors upholding the license fees. Unlike Ramah and Bracker, there is extensive state regulation of horse racing and simulcast off-track betting. The level of the state regulation here far exceeds that in Cotton Petroleum, which was apparently limited to regulating "the spacing and mechanical integrity of wells located on the reservation." 109 S. Ct. at 1712c. California has a statutory plan regulating in minute detail the allocation of revenues and expenses associated with horse racing and off-track betting.

Furthermore, the fact that the cost to California of regulating the off-track betting facilities may be less than the revenues it derives from the license fees does not invalidate the fees. As in Cotton Petroleum, the revenues here far exceed the itemized costs of regulation. Additionally, as in Cotton Petroleum there are many costs borne by the State that are of a general nature and which cannot be assigned to any particular gambling operation. The presence of horse racing in California requires the State to support additional law enforcement and tax collection bureaucracies as well as establishing and operating the extensive administration that oversees the horse

racing industry. Even if the state revenues were disproportionately larger than state expenses, the lack of proportionality does not make the tax an impermissible burden on the tribes. See Cotton Petroleum, 109 S. Ct. at 1714.

VIII

When the nature of the activity that a state seeks to tax is unrelated to traditional Indian activity and consists of taking advantage of an exemption not available to non-Indians, an indirect tax will be upheld. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980), the Court upheld a tax on cigarettes sold on Indian lands to non-Indians. In evaluating the legitimacy of the tax, the Court examined the source of the value being marketed by the tribes:

> It is painfully apparent that the value marketed by the smokeshops to person coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.

Id. at 155. Because the value was not generated by the tribes, the Court found that the tribes' interest in raising revenue was weak. The tribal interest "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." Id. at 156-57.

The tribal interest in raising revenue is stronger where the value being marketed is gaming, as in the present case, than it is where the tribes are seeking to take advantage of a tax exemption, as in Colville. Gaming is a major source of employment on Indian reservations, and tribes make large investments in building and maintaining gaming facilities. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987). In Cabazon, the Supreme Court distinguished Colville, noting the extent of the tribes' efforts to attract customers to their gaming facilities:

> The Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have build [sic] modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.

Cabazon, 480 U.S. at 219.

Applying the principles of Colville and Cabazon to the present case, the court finds that the nature of the value being marketed is a neutral factor. Although the Tribes here, as in Cabazon, have an extensive commitment to operation of their gaming operations, this case is different because it involves simulcast horse racing, not the card games and bingo at issue in Cabazon. Plainly card games and bingo conducted in buildings constructed on Indian land offer a value generated on the reservation. However, the value of parimutuel betting on simulcast horse racing is derived largely from an activity – live

horse racing – occurring outside the reservation and operated by non-Indian racing associations. Because the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests.

IX

The court holds that the license fees California collects from the horse racing associations which broadcast their races to on-reservation betting operations are neither preempted by IGRA nor a violation of the Tribes' sovereign immunity. Although IGRA addresses the permissibility of direct taxes, there is no explicit preemption of the indirect tax imposed by the license fees. IGRA's legislative history suggests that Congress did not intend to preempt the indirect tax at issue here. In evaluating whether Congress has impliedly preempted the license fees through the sovereign immunity accorded to the Tribes, the court has balanced the strength of the federal, tribal and state interests involved in Class III gaming operations in California. Because the taxes are collected from the horse racing associations and do not reduce the profitability of the tribal gaming operations, there is no economic burden on the Tribes. California is an active participant in regulating horse racing and off-track betting, and has not abandoned this area to the federal government or the tribes. Finally, the nature of the off-track betting is a mix of on-reservation and off-reservation activity. After weighing these factors, the court holds that California may tax the racing associations by imposing license fees on all the revenue generated by simulcast

wagering, including wagering at the Tribes' on-reservation simulcast facilities.

The Clerk of the Court is directed to enter judgment in favor of the State of California.

IT IS SO ORDERED.

DATED: . . .

DAVID F. LEVI

UNITED STATES DISTRICT JUDGE

37 F. 3d 430 printed in FULL format.

CABAZON BAND OF MISSION INDIANS, a federally recognized Indian Tribe; SYCUAN BAND OF MISSION INDIANS, Plaintiffs-Appellants, v. PETE WILSON, Governor, et al., Defendants-Appellees.

No. 92-15751

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

37 F.3d. 430; 1994 U.S. App. LEXIS 27760; 94 Cal. Daily Op. Service 7671; 94 Daily Journal DAR 14077

October 5, 1993, Argued, Submitted, San Francisco, California
October 6, 1994, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-90-01118-DFL. David F. Levi, District Judge, Presiding.

This Opinion Substituted on Grant of Rehearing for Withdrawn Opinion of May 9, 1994, Previously Reported at: 1994 U.S. App. LEXIS 10186.

DISPOSITION: REVERSED and REMANDED with instructions.

COUNSEL: George Forman, Alexander & Karshmer, Berkeley, California, and Glenn M. Feldman, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, Arizona, for the plaintiffs-appellants.

Cathy Christian, Supervising Deputy Attorney General, Sacramento, California, for the defendants-appellees.

JUDGES: Before: Robert Boochever, David R. Thompson, and Diarmuid F. O'Scannlain, Circuit Judges. Opinion by Judge O'Scannlain.

OPINIONBY [sic] : DIARMUID F. O'SCANNLAIN

OPINION: OPINION AND ORDER

O'SCANNLAIN, Circuit Judge:

We consider the power of the State of California to tax offtrack betting activities on Indian reservations.

I

Plaintiffs Cabazon Band of Mission Indians and Sycuan Band of Mission Indians ("the Bands") conduct simulcast wagering (offtrack betting) on their reservations to raise tribal revenue. Such activities are regulated by the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, which categorizes Indian gaming into three classes; simulcast wagering is Class III gaming. Under IGRA, states and Indian tribes must negotiate compacts to regulate the terms under which Class III gaming may be conducted. Here, California and the Bands entered into compacts for the Bands to operate their simulcast wagering facilities.

Southern California Off Track Wagering, Inc. ("SCOTWINC") is a quasi-governmental organization of racing associations formed under California law. Cal. Bus. & Prof. Code § 19608.2. Both Bands entered written agreements with SCOTWINC and the racing associations which conduct the live horse races. SCOTWINC arranges for the racing associations' broadcast signals to be transmitted to the Bands' on-reservation simulcast wagering facilities. SCOTWINC also accepts the wagers and handles the cash at the Bands' facilities.

Under the terms of the compacts between California and the Bands, SCOTWINC distributes to the Bands 2.33% of the money wagered at their simulcast wagering facilities. Two percent is the typical commission offered by racing associations for operating a satellite wagering facility; the remaining 0.33% is paid to the Bands in their deemed "local government" capacity. The Bands contend that an additional amount should be distributed to them rather than remitted to the State of California measured by the proportion of license fees payable on wagers placed at their facilities.

SCOTWINC remits to the State the license fee imposed under Cal. Bus. & Prof. Code sections 19605.71(a) and (b), 19606.5 and 19606.6, which is a percentage of all wagers placed. Different percentages are paid based on the location of the wager (ontrack or offtrack), the type of wager (conventional or exotic), and the type of race (breed of horse and distance). Part of this license fee is based on wagers placed at Indian wagering facilities. California concedes that the license fee is a tax. The Bands assert that part of the license fee based on wagers placed at Indian facilities is a tax prohibited under both IGRA and traditional grounds of federal preemption, and should be payable instead to the Bands.

Because the State of California and the Bands could not agree whether the State had the power to collect the license fee based on wagers at Indian facilities, the negotiated compacts specifically state that the Bands will sue the State for declaratory relief. After the Bands brought suit, both sides moved for summary judgment, which the district court granted for the State. See Cabazon Band of

Mission Indians v. California, 788 F. Supp. 1513 (E.D. Cal. 1992). The Bands timely appealed.

II

The Bands first contend that the State's license fee is impermissible under IGRA. The Bands argue that IGRA expressly prohibits the taxation of both Indian Bands and those entities authorized by such Bands to engage in Class III gaming activities. In support of their contention, the Bands point to section 2710(d)(4) of IGRA, which provides that "nothing in this section shall be interpreted as conferring upon a State . . . authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4).

The Band's reasoning is flawed because it equates the failure to confer authority to tax with a prohibition to tax. We objected to this kind of statutory construction in Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914, 923 (9th Cir. 1992), vacated on other grounds, 113 S. Ct. 2485 (1993). In that case, the plaintiffs sought an injunction requiring the admission of aliens into the United States. Opposing the injunction, the government cited 8 U.S.C. § 1255(a)(3)(C), which states "nothing in this section shall be construed as authorizing" petitioners' admission into the country. Although we affirmed the district court's denial of the injunction, we explicitly stated that the statute did not provide a basis for our affirmance because, "although the statute does not authorize admission to the United States, it does not prohibit

admission either." Catholic Social Servs., Inc., 956 F.2d at 923.

Similarly, section 2710(d)(4) is not on its face a prohibition of state taxation. The absence of an express prohibition on the State's power to tax does not end our inquiry, however.

III

The Supreme Court has, as a matter of federal Indian law, explicitly "rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980). Thus, we must analyze whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance.

In determining whether federal law preempts a state's authority to regulate activities on tribal lands, courts must apply standards different from those applied in other areas of federal preemption. "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334, 76 L. Ed. 2d 611, 103 S. Ct. 2378 (1983). In balancing these federal, tribal, and state interests, no specific congressional intent to preempt state activity is required; " 'it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.' "

Crow Tribe of Indians v. Montana, 819 F.2d 895, 898 (9th Cir. 1987), aff'd, 484 U.S. 997, 98 L. Ed. 2d 638, 108 S. Ct. 685 (1988) (quotation omitted). Furthermore, "ambiguities in federal law are, as a rule, resolved in favor of tribal independence." Cotton Petroleum v. New Mexico, 490 U.S. 163, 177, 104 L. Ed. 2d 209, 109 S. Ct. 1698 (1989).

We analyze the federal, tribal, and state interests in turn.

A

The federal interests before us are clearly set forth in the language of IGRA itself. Intended to "promote tribal economic development, self-sufficiency, and strong tribal governments," IGRA seeks to "ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. §§ 2701(1) and (2) (emphasis added).

The State's current licensing fee threatens this federal objective. Between March 1, 1990 and February 28, 1991, the State collected $292,075 in license fees from wagers handled at the Cabazon Band's simulcast wagering facility. During that same period, the Cabazon Band earned $217,386. Similarly, between November 1, 1990 and March 3, 1991, $440,175 in license fees were deducted and distributed by SCOTWINC to the State from wagers placed at the Sycuan Band's facility. The Sycuan Band received only $318,743. In both cases, the State benefited from the tribal gaming operation to a considerably greater extent than the Bands. Neither Band would be described as a "primary beneficiary." Such an outcome contravenes the purposes of IGRA. See White Mountain Apache Tribe, 448 U.S. at 149 (concluding that state was preempted from

imposing fuel tax on a non-Indian logging company harvesting timber on tribal land because "the taxes would threaten the overriding federal objective of guaranteeing Indians that they 'will receive . . . the benefit of whatever profit [the forest] is capable of yielding.' ").

B

The State's licensing scheme also undermines tribal interests. We agree with the district court that the license fee imposed falls directly upon the racing association, and not the Bands.[1] To say that the fee is a direct tax only upon the racing associations is not to say that the Bands are not economically burdened by such fee, however. Discussing federal Indian preemption, the Supreme Court in Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 844 n.8, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982), declined to adopt a "legal incidence test," under which "the legal incidence and not the actual burden of the tax would control preemption inquiry." The

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[1] Despite the Bands' assertions to the contrary, we conclude that the Bands are not directly burdened by the tax before us. The Bands do not pay any of their commission to the State, do not write a check to the State, and do not have any direct contact with the State with respect to the license fee. The Bands' argument that the tax is imposed directly on the Bands because California law imposes different percentage license fees for wagers made at satellite wagering facilities is not persuasive. See Cal. Bus. & Prof. Code §§ 19605.3, 19605.71, 19610. The statutes the Bands cite also establish different tax rates for different breeds of horses and distances. Cal. Bus. & Prof. Code § 19605.71. This, of course, does not mean that the breed of horse pays a direct tax. Place of wager and breed of horse are simply variables in the tax formula.

Court instead focused on the fact "that the economic burden of the asserted taxes would ultimately fall on the Tribe," even though the legal incidence of the tax was on the non-Indian logging company. Id.

Here, as in Ramah Navajo, the Bands bear the actual burden of the license fee. The district court reached a conclusion opposite from our own, reasoning that under California law, surplus revenue is to be divided equally between the racing association and the horsemen. Cal. Bus. & Prof. Code §§ 19605.8 & 19606. Thus, the district court concluded, if the racing association did not pay that part of the license fee based on wagers at Indian satellite facilities, the Bands would not be entitled to the money saved. As the court explained, "because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes." Cabazon Band, 788 F. Supp. at 1518.

State law does not govern this case, however. Rather, the terms of the compact control. S. Rep. No. 446, 100th Cong. 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3075-76 ("Unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."). Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the

Bands do indeed have a "right" to the unpaid fees. The licensing scheme currently imposed thus constitutes an economic burden.

In assessing the Bands' interests, we also must consider the nature of the taxed activity. Cf. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219-20, 94 L. Ed. 2d 244, 107 S. Ct. 1083 (1987) (state regulation of on-reservation bingo games preempted because tribe was generating value on reservation); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980) (upholding state tax on on-reservation sales of cigarettes to non-Indians because value of transaction was "not generated on the reservations by activities in which the Tribes have a significant interest"). "That a tribe plays an active role in generating activities of value on its reservation gives it a strong interest in maintaining those activities free from state interference." Gila River Indian Community v. Waddell, 967 F.2d 1404, 1410 (9th Cir. 1992).

Although recognizing the Bands' "commitment to operation of their gaming operations," the district court found that the value of the Bands' activity was derived from live horse racing, an activity "occurring outside the reservation and operated by non-Indian racing associations." Cabazon Band, 788 F.Supp. at 1521. Consequently, the court concluded, "because the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests." Id.

The district court has mischaracterized the Bands' interest, in our view. In this instance, the Bands have

invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others. Cabazon, 480 U.S. at 219 ("Here . . . the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians.").

C

In contrast to the federal and tribal interests articulated above, the State's interests are weaker, although certainly not trivial. As the district court recognized, the State of California has an extensive regulatory scheme for offtrack betting and expends funds to regulate this activity. Thus, "this is not a case in which the State has nothing to do with the on-reservation activity, save tax it." Cotton Petroleum, 490 U.S. at 186.

The State's asserted interest is weakened in this case, however, because IGRA specifically recognizes such state regulation and establishes a mechanism – the compacts – by which Bands can reimburse the State for regulatory costs, outside of the State tax structure. Indeed, the Cabazon and Sycuan Compacts expressly provide for the modification of the compacts to allow for such reimbursement in the event that the Bands prevail in this action. Thus, the State's interest can be satisfied without imposition of the license fee.

Furthermore, this court has required that the State demonstrate a close relationship between the tax imposed on the on-reservation activity and the state interest asserted to justify such tax. See Crow Tribe, 819 F.2d at 901 (concluding that a state tax was not narrowly tailored to serve state interest of paying for government services associated with production of coal because 19 to 30% of the tax went to the state general fund). Here, there is no narrow tailoring since California does not use the license fee revenues to fund services related to the regulation of offtrack betting. Rather, 100% of the license fee earned from Indian wagering goes into the State General Fund. This suggests a "distant, rather than a carefully tailored, relationship" between the license fee revenue and the regulatory services provided thereunder.[2] Id.

The express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee.

IV

We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands.

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[2] Congress specifically recognized the raising of revenue as a legitimate state interest with respect to Class III gaming. See S. Rep. No. 446, 100th Cong. 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3071, 3083. This interest must be informed by the congressional intent that the Bands be the primary beneficiaries of such gaming, however.

REVERSED and REMANDED with instructions.

ORDER

The petition for rehearing is GRANTED.

The opinion filed on May 9, 1994 is hereby WITHDRAWN and the attached opinion shall be filed in lieu thereof.

NIELSEN, MERKSAMER,
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, vs. PETE WILSON, in his official capacity as Governor of the State of California; the STATE OF CALIFORNIA; and the CALIFORNIA HORSE RACING BOARD, Defendants,	No. CIV-S-90-1118-DFL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT INTERVENORS' MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS DATE: August 9, 1996 TIME: 9:00 a.m. COURTROOM: 3

SYCUAN BAND OF MISSION INDIANS,

Plaintiffs,

vs.

PETE WILSON, in his official capacity as Governor of the State of California; the STATE OF CALIFORNIA; and the CALIFORNIA HORSE RACING BOARD,

Defendants,

(Filed July 3, 1996)

BARONA BAND OF MISSION INDIANS, a/k/a BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, a recognized Indian tribe,

Plaintiffs,

vs.

PETE WILSON, in his official capacity as Governor of the State of California; the STATE OF CALIFORNIA; and the CALIFORNIA HORSE RACING BOARD,

Defendants,

VIEJAS BAND OF MISSION INDIANS,

Intervenor.

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC. (SCOTWInc.), DEL MAR THOROUGHBRED CLUB, HOLLYWOOD PARK, INC., LOS ANGELES TURF CLUB, OAK TREE RACING ASSOCIATION, LOS ALAMITOS RACE COURSE, LOS ANGELES COUNTY FAIR

Defendant Intervenors.

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INTRODUCTION

The proposed defendant intervenors ("proposed intervenors") recognize that the instant litigation has been ongoing for in excess of four years and that the present proceedings follow the mandate of the Court of Appeal. (*Cabazon v. Wilson*, 37 F.3d 430 (9th Cir. 1994). However, proposed intervenors seek intervention as a matter of right under FRCP 24(a)(2).

Pursuant to the provisions of the California Horse Racing Law,[1] and under the supervision of the California Horse Racing Board (CHRB), six of the seven proposed intervenors conduct horse racing meets in California and transmit a signal of the meet to satellite wagering facilities both within California and to locations out of state. Under the Horse Racing Law, these entities are known as "racing associations", who are licensed to conduct race meets at private race tracks and fair race tracks to which the CHRB has assigned specific racing dates. (Bus. & Prof. Code §§ 19480-19489; 19530-19535.)

The seventh proposed intervenor is Southern California Off-Track Wagering, Inc. (SCOTWInc.). The Horse

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[1] California Business and Professions Code §§ 19400, et seq.

Racing Law permits the racing associations and racing fairs to form simulcast organizations to operate the satellite wagering equipment and parimutuel system. The purpose of the organization is to permit the associations providing the audiovisual signal "the ability to do so without undue burden and expense, to avoid unnecessary duplication of facilities, to permit the associations to protect the security of their signals . . . [and] the integrity of their parimutuel pools and to account for wagering proceeds included in the parimutuel pools. (Cal. Bus. & Prof. Code § 19608.2(a).)

Any such organization must provide "meaningful representation" on its governing board to horsemen's organizations who contract with the racing associations and to non-racing fairs who operate a satellite wagering facility. (Cal. Bus. & Prof. Code § 19608.2(d).) The simulcast organization created by racing associations and fairs located in the southern zone of the State (defined in Cal. Bus. and Prof. Code § 19530.5 and in which all the Tribes who are parties to this litigation are located) is known as SCOTWinc.

The intervening racing associations and the horsemen (who are represented here through the intervention of SCOTWinc.), have a property interest in any past and future monies derived from satellite wagering that is not distributed to others pursuant to the provisions of the Horse Racing Law. This is so because the associations and horsemen share equally in all revenues from satellite wagering that are not returned to the betting patrons or distributed to various entities by the Legislature.

Pursuant to the Horse Racing Law, approximately 17% of the amount wagered at a satellite wagering facility ("the takeout") is distributed pursuant to statute. The satellite wagering facilities, including the Tribes, are entitled to 2% of the amount wagered at their respective facilities as a "commission." For thoroughbred horse races, 2.5% of every conventional wager and 4% of every exotic wager is distributed to the State as a "license fee." The state license fee is less for other breeds of horses. Specified percentages are also distributed, inter alia, to local governments, the simulcast organization (SCOT-Winc.), the official breeders registering agency and various research facilities operated by the University of California. Whatever amount remains after all the distributions are made is distributed 50% to the racing association and 50% (in the form of purses) to the horsemen. (Cal. Bus. & Prof. Code §§ 19605.7, 19605.71, and 19605.8.)

The decision of the Ninth Circuit in this matter ignores State law as incorporated into the tribal-state compacts (see, paragraph 16 of the compacts) and finds that the Tribes had acquired a right to the state license fee because of the provisions of paragraph 19 of the compacts. Paragraph 19 provides that if the state license fee is determined to be impermissible under the Indian Gaming Regulatory Act ("IGRA")[2], the state license fee will be retained by the Tribes. These are monies that would otherwise be shared equally between the racing association conducting the particular meet and the horsemen participating in the meet.

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[2] 25 U.S.C. §§ 2701, et seq.

The Ninth Circuit did not construe the provisions of the tribal-state compacts negotiated between the Tribes and the State. Rather, while finding the state license fee impermissible under IGRA, the Court acknowledged that the state license fee is not imposed against the Tribes, but rather against the racing associations and horsemen. (*Cabazon v. Wilson*, 37 F.3d 430, 433, *supra*.) However, the Ninth Circuit viewed those compact terms which provided for the Tribes to retain the state license fee if the fee was declared impermissible as creating a right in the Tribes that was burdened if the State collected a license fee from wagers placed on Indian lands. The Court then remanded the matter to this Court to enter judgement consistent with its holding.

Because the Tribes had moved only for partial summary judgment on their initial action for declaratory relief, this Court required the Tribes to amend their complaints against the State and allege that the compact provisions were, in fact, being breached by the State by its refusal to pay to the Tribes the state license fee collected from the racing associations. The State responded with an amended answer and several affirmative defenses.

In its amended answer, the State denied any responsibility to pay the state license fee to the Tribes and further alleged that the Tribes had breached their compacts by operating illegal slot machines and other casino-style games at their satellite wagering facilities. The State also raised, by affirmative defense, the fact that a complaint against the State for breach of compact which construed the compacts to require the State to tax the racing associations and pay that money over to the Tribes

must name the racing associations – whose assets were being taxed – as indispensable parties.

This Court granted the Tribes' motion to strike all of the State's affirmative defenses. Up to that point, the racing associations reasonably expected that their interests were adequately represented by the State. Since the Ninth Circuit's decision did not construe the compacts to require the State to do anything, the threat to intervenors' property interest was unclear. On remand, the State argued that the Tribes' action could not proceed without naming the racing associations, something the Tribes failed to do. Therefore, the actual threat to intervenors' property interests only became substantial when this Court – in its most recent memorandum and order – permitted the Tribes to proceed without naming the racing associations and held that the compacts required the State to turn the license fee collected from the associations over to the Tribes.

For the reasons set forth below, proposed intervenors believe that under the present posture of the case they have a right under Federal Rules of Civil Procedure section 24(a)(2) to intervene as defendants.

I. THE MOTION TO INTERVENE IS TIMELY

In reviewing the history of this litigation, it is reasonably clear that until the decision of the Ninth Circuit on October 6, 1994, no property interest of the proposed intervenors was at risk in this litigation. The issue before the District Court and the Ninth Circuit was narrow and precise, viz., is the license fee imposed on and paid by the

racing associations for wagers placed at satellite wagering facilities an impermissible tax on the Tribes?

The racing associations had no interest in this issue at the early stages of this litigation. Although the proposed intervenors certainly agreed with the State that the state license fee is a tax imposed against the assets of the racing associations and horsemen, the racing associations were also aware that, if the tax was ultimately determined to be impermissibly imposed on the Tribes, the compact simply provided that the tax would be refunded.

Both the District Court and the Ninth Circuit found that the license fee was not a tax on the Tribes. However, the Ninth Circuit held the tribal-state compact itself created a tribal right to the state license fee and that therefore the State's retention of the fee constituted an impermissible burden on the Tribes.

The Ninth Circuit also recognized that, under state law, the racing associations and the horsemen were entitled to share equally in all revenues remaining in the parimutuel pool after the statutory distributions were made. However, the Ninth Circuit held this requirement was superseded by the terms of the compact, which, according to the Court, granted the Tribes a right to the tax revenues.

From the perspective of the racing associations, at the point of the Ninth Circuit's decision the only matter that had been decided which might affect the racing associations was a determination that the state license fee was impermissible. The order of the Court of Appeals was as follows:

> "We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. (37 F.3d 430, 435.)

The fact that the State could no longer tax the racing associations, as a matter of federal law (IGRA), did *not* mean that the Tribes were entitled to the tax. That determination could only be made by interpreting the directory provisions of the compacts themselves, something the Ninth Circuit did not do. In fact, after the Ninth Circuit's opinion, the racing associations could reasonably believe that the tax monies would remain with them. (See, *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 899 (9th Cir. 1987), aff'd., 484 U.S. 997 [State was not permitted to tax *lessee* of tribal coal deposits because state tax increases costs of coal production and reduces tribal royalties.]; *Hoopa Valley Tribe v. Nevins, et al.*, 881 F.2d 657 (9th Cir. 657, 660) [State was not permitted to impose a timber yield tax on a *private timber company* harvesting timber from reservation lands because tax was ultimately paid by the Tribe.].)

Subsequent to the Ninth Circuit's decision, the issues in this litigation expanded when the validity of the compacts was called into question by the State. The State asserted that 1) it had never agreed to *refund* the Tribes any monies unless the state license fee, rather than the provisions of the compact, was determined to constitute an impermissible tax on the tribe; and 2) the Tribes breached their compacts by conducting unlawful slot machine and other casino-style gambling at their wagering facilities. On remand, this Court ruled that amended complaints and answers would be required because the

original declaratory relief complaints alleged only that the license fee was an impermissible tax on the Tribes.

Amended complaints were filed by the Tribes in which the Tribes claimed that the State had failed to pay to the Tribes the state license fee. In the State's answer to the Tribes' amended complaints, it asserted as an affirmative defense that the Tribes amended complaints, as distinguished from their original complaints, are making a claim to monies concededly raised by state taxation of the racing associations and that the associations are therefore indispensable parties.

In its memorandum and order of April 26, 1996, this Court struck this defense, along with the other defenses raised by the State, stating that there is no indication that the racing association and horsemen have claimed an interest in this litigation. A motion for reconsideration has been filed by the State and is scheduled for hearing on July 12.

Even after the Tribes amended their complaints, it was not until this Court's most recent ruling that the racing associations' property interests were directly threatened by action of the State in response to a judgment of this Court. Whereas the racing associations were adequately represented by the State's contention that the associations were indispensable parties who the Tribes failed to name, this Court's decision finding that the racing associations were not indispensable parties (and its comment that the associations had shown no interest in this litigation) puts the property interests of the proposed intervenors directly at issue.

Accordingly, the proposed intervenors contend that the motion to intervene at this stage of the litigation is timely and should be granted.

II. PROPOSED INTERVENORS HAVE A PROPERTY INTEREST THAT WILL BE IMPAIRED BY THE COURT'S ORDER

The Ninth Circuit's conclusion that the tribal-state compacts supersede state law (even though state law was incorporated into the compacts [see paragraph 16 of each of the compacts]) also raises important legal questions. The Ninth Circuit cited no authority for this proposition. Although the compacts may have the force of a federal statute, in that Congress' determination of the appropriate scope of gambling on Indian lands is whatever is defined as that which is permitted under state law and incorporated into a tribal-state compact, such compacts cannot create state law, nor can they supersede federal constitutional rights.

Compacts between States, which are expressly authorized by the United States Constitution, and which must be approved by Congress, do supersede state statutory and constitutional provisions. However even interstate compacts do not supersede the federal constitution. This proposition was made abundantly clear in a series of cases involving regulatory "taking" issues arising from the planning decisions of the Tahoe regional Planning Agency created by the Tahoe Regional Planning Compact between California and Nevada. (See *Jacobson v. TRPA*, 566 F.2d 1353, 1358 (9th Cir. 1977); *Stephan v. TRPA*, 697

F.Supp. 1149 (D.Nev. 1988); *Tahoe Sierra Preservation Council v. TRPA*, 938 F.2d 153 (9th Cir. 1991); and *Tahoe Sierra Preservation Council v. TRPA*, 34 F.3d 753 (9th Cir. 1994.).)

The tribal-state compacts before this court do not rise to the level of interstate compacts approved by Congress. The only extent to which the State constitution or laws are superseded by a compact executed pursuant to IGRA is to the extent that such provisions conflict with the implementation of IGRA. IGRA does not create a right in the Tribes to property of third parties, and even if it did, it would be unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. The State simply cannot confer on the Tribes, even under the compulsion of IGRA or a tribal-state compact, such a right in the Tribes.[3]

Moreover, such action by the State in depriving proposed intervenors of their property rights is violative of the State constitution. Article 1, section 7(a) of the California Constitution provides, in pertinent part, as follows:

> "A person may not be deprived of life, liberty or property without due process of law . . . ."

Nothing in IGRA permits the Governor and the CHRB the power to execute a tribal-state compact which deprives proposed intervenors of rights guaranteed under the

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[3] Proposed intervenors recognize that the State does not intentionally propose to deprive them of their property rights. Nonetheless, it is important to analyze the power of the State to do so, even if the State is reluctantly complying with federal law or with provisions of a tribal-state compact which have been interpreted by a federal court in a manner not originally intended by the State.

State Constitution. (See, *Apache Tribe of the Mescalero Reservation v. State of New Mexico*, ___ F.Supp. ___ (D.N.Mex. June 6, 1996), Case No. CIV 92-0076 JC/WWD, Slip Opn. at pp. 14-16 [compact signed by the Governor without authority under state law is null and void.])

Proposed intervenors have no other means of defeating the Tribes' claims against their property interest except through intervention as defendants in this action. Unlike the State, the racing associations have no authority to bring an independent action to challenge the terms of the compact. Such an action would undoubtedly require that the Tribes be named; their response would also undoubtedly be to raise their immunity from suit.

Nor have intervenors any authority to bring an independent action against the State. The Ninth Circuit has held that the compact controls over state law. Unless the compact itself is challenged, which would require that the Tribes be named, there is no other avenue of relief for the racing associations other than to intervene in this action to raise their constitutional claims in opposition to this Court's interpretation of the compact provisions.

III. AT THIS POINT IN THE LITIGATION, THE INTEREST OF THE RACING ASSOCIATIONS CANNOT BE ADEQUATELY PROTECTED BY THE STATE.

The basis of the proposed intervenors' motion is that the construction of the compacts urged by the Tribes and adopted by this Court is an unconstitutional taking of the property of the racing associations and the horsemen. It is

imperative that the proposed intervenors be allowed to assert their claim in this litigation.

Obviously, the State does not believe its actions in negotiating compacts with the tribes were unconstitutional. The State has repeatedly asserted that it disagrees with the import of the compacts' terms as determined by the Ninth Circuit, and of the construction of the compact given by this Court. However, with all due respect to the State and the State's intentions – with which the racing associations have no quarrel – as a practical matter, the issue of a constitutional taking can more effectively be advanced by the owner of the property interest taken than by the party who inadvertently caused the taking.

Further, the Court has rejected the State's argument on behalf of the racing associations that they are indispensable parties to this action. Thus, under the present posture of the case, the Court will proceed to reach a decision without addressing the constitutional concerns of the proposed intervenors.

For these additional reasons, proposed intervenors urge this Court to grant their motion to intervene.

IV. THE ISSUE RAISED BY THE PROPOSED INTERVENORS IS SOLELY ONE OF LAW

Nothing in the provisions of IGRA purports to suggest that the Governor and the California Horse Racing Board on the one hand, and the Tribes and the Secretary of the Interior on the other, have the power to enter into a consensual arrangement transferring property belonging

to a non-tribal entity to the Tribes. The ramifications of such an interpretation are endless and very disturbing.

For example, under the Court's decision, nothing would legally prevent the State and the Tribes from amending their compacts to increase the Tribes' share of satellite wagering revenues by transferring to the Tribes the exclusive right to retain all revenues in the parimutuel pool. Indeed, although the Tribes are currently only seeking to appropriate to themselves the license fee paid to the State by the racing associations, nothing prevents them from later seeking to retain the distributions required by the Horse Racing Law to such entities as the University of California's equine research institutes or the distribution to SCOTWInc. itself.

Although the racing associations' claim is constitutional, under both the Fifth and Fourteenth Amendments and Article 1, section 7(a) of the California Constitution, these are solely issues of law which can be presented without unduly delaying disposition of this case. Their importance mandates that this Court consider them before rendering judgment in this matter.

Respectfully submitted,

DATED: July 3, 1996

NIELSEN, MERKSAMER,
PARRINELLO MUELLER
& NAYLOR

By: /s/ Cathy Christian
CATHY CHRISTIAN
Attorneys for
Defendant Intervenors

By: /s/ Richard D. Martland
RICHARD D. MARTLAND
Attorneys for
Defendant Intervenors

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. §§ 1013a, 2015.5)

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 770 L Street, Suite 800, Sacramento, California 95814.

On July 3, 1996, I served the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT INTERVENORS' MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS** on the parties in said action by enclosing a true copy thereof in an envelope and placing the envelope for collection and mailing on the date and at the place set forth above following our ordinary business practices, addressed as follows:

PLEASE SEE ATTACHED LIST

I am readily familiar with this firm's practice for collecting and processing envelopes for mailing. On the same day that envelopes are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EM Executed on July 3, 1996, at Sacramento, California.

/s/ _____
CHERYL BALDI

PROOF OF SERVICE LIST

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, v. PETE WILSON, as Governor of the State of California, the STATE OF CALIFORNIA, and the CALIFORNIA HORSERACING BOARD, Defendants.	CIV-S-90-1118 DFL PLAINTIFFS' OPPOSITION TO PROPOSED INTERVENORS' EX PARTE APPLICATION FOR ORDER SHORTENING TIME. DATE: August 9, 1996 TIME: 9:00 a.m. PLACE: Courtroom 3

BARONA AND VIEJAS BANDS OF OF [sic] MISSION INDIANS,

Plaintiffs in Intervention,

v.

PETE WILSON, GOVERNOR, et al.,

Defendants.

INTRODUCTION

A mere week before this Court is scheduled to conduct a long-noticed hearing that may well virtually end this protracted litigation, SCOTWInc. and six of its constituent members have filed and served a motion for leave to intervene – over plaintiff Tribes' objections – as defendants in this action in order to litigate matters that already have been finally decided concerning Tribal-State compacts to which the would-be intervenors are total strangers. The intervention motion has been noticed for hearing on August 9, 1996.

Not content to impose upon plaintiff Tribes the additional burden of having to respond to a motion for leave to intervene that is so plainly lacking in merit as to be frivolous, SCOTWInc. and its ilk have made an *ex parte* motion to disarrange and delay the existing schedule for resolving the State defendants' motion for reconsideration, and thus the ultimate resolution of this litigation, by allowing them to re-notice their motion to intervene "for the same time as the State's Motion for Reconsideration and that the State's motion be re-noticed to a time that

will allow Plaintiffs and the State an opportunity to reply to proposed Defendant Intervenors' motion."

For the reasons set forth below, the Court should deny the motion for an order shortening time and hear the pending motion for reconsideration precisely as scheduled, without waiting to hear and resolve the intervention motion.

ARGUMENT

I. PROPOSED INTERVENORS HAVE NOT COMPLIED WITH OR JUSTIFIED THEIR FAILURE TO COMPLY WITH THE REQUIREMENTS OF LOCAL RULE 142(e).

In support of their application to shorten time, proposed intervenors have submitted only a declaration of counsel that states that he waited until June 27, 1996 to fax and send letters (dated June 28, 1996) to counsel for the existing parties informing them that his firm is "familiar with the procedural posture of the case" and alerting them to his clients' intention to seek to intervene; that counsel for the State defendants orally expressed no objection to intervention; and that counsel for the Sycuan, Cabazon and Barona Bands informed him in writing that they would oppose his clients' attempt to intervene. In light of the requirements of Eastern District Local Rule 142(e), what is *not* said in this declaration is far more significant than counsel's innocuous chronology.

> Under L.R. 142(e), an application to shorten time
>
> "shall set forth by affidavit of counsel the circumstances claimed to justify the issuance of an

> order shortening time. Ex parte applications to shorten time will not be granted except upon affidavit of counsel showing a satisfactory explanation for the need for the issuance of such an order and for the failure of counsel to obtain a stipulation for the issuance of such an order from other counsel or parties in the action."

Nowhere in any of the pleadings submitted by the proposed intervenors is there even an attempt to describe the circumstances that are claimed to justify the issuance of an order shortening time, or to offer a satisfactory explanation for the need for the issuance of such an order and for counsel's failure to obtain a stipulation for the issuance of such an order. There is a good reason why the showings required by the rule are lacking; proposed intervenors cannot possibly make any of the required showings.

Plaintiff Tribes do not question the June 28 representation that counsel for proposed intervenors are familiar with the procedural posture of this case. Indeed, until recently, one of the attorneys signing the proposed intervenors' pleadings (Cathy Christian) was among the State defendants' attorneys of record in this action, and in that capacity repeatedly made the same arguments that proposed intervenors would make on the merits of their claims.

However, given that familiarity, proposed intervenors' failure even to proffer an excuse – much less either a satisfactory explanation or justification – for doing nothing about intervening or obtaining the parties' consent to a motion to intervene until *two months* after

this Court's April 26, 1996 order striking the State defendants' affirmative defenses and dismissing the counterclaims clearly constitutes sufficient grounds upon which to base the Court's denial of the application to shorten time.

By their own admission, proposed intervenors have known that the purported "rights" that they would litigate through intervention have been "at risk" ever since the Ninth Circuit entered its October 6, 1994 decision that the Tribal-State Compacts, rather than State law, determine the disposition of the funds that otherwise would be deducted and paid over to the State as a license fee on wagers placed at Tribal simulcast facilities. Proposed Intervenors' Memorandum of Points and Authorities, p. 7:13-15. Moreover, the proposed intervenors have known since shortly after that decision of the Tribes' contention that once the Ninth Circuit's decision became final, the Tribes not only would be entitled to be paid an amount equal to what previously had been deducted and paid over to the State as license fees, but also to future payments of what otherwise would be paid over to the State as license fees on wagers placed at Tribal simulcast facilities.

On November 25, 1994, SCOTWInc. in connection with renewal of the Simulcast Agreements by and among SCOTWInc., the Sycuan Band of Mission Indians and the various racing associations comprising SCOTWInc., SCOTWInc. sent a letter to, *inter alia*, Sycuan proposing

that Section 5(b) of the Simulcast Agreements[1] be deleted in its entirety, in part because if the State could not collect its license fee on wagers placed at Tribal simulcast facilities, the California Horse Racing Law required that the money that otherwise would be paid over to the State as license fees be paid instead to the racing associations. The text of Section 5(b) is contained in the copy of such an agreement attached as Exhibit A to the Declaration of George Forman submitted herewith. A true copy of SCOTWInc.'s November 25, 1994 letter to Sycuan is attached as Exhibit B to the Declaration of George Forman submitted herewith.

On January 6, 1995, counsel for Sycuan wrote back to SCOTWInc. objecting to SCOTWInc.'s proposal and explaining why the only lawful result of the Ninth Circuit's decision would be payment of past and future license fees over to the Tribes. A true copy of that letter is attached as Exhibit C to the Declaration of George Forman submitted herewith.

In short, the proposed intervenors have known about this case, the issues in this case, and the likely consequences of a decision favorable to the Tribes in this case, for a very long time. They certainly knew enough about the issues and the status of the case so that they could have properly noticed their motion for leave to intervene in accordance with this Court's rules, rather than waiting until the last minute to seek *ex parte* relief that would

---

[1] This Section contained the substance of the language of Section 19 of the Tribal-State Simulcast Wagering Compacts concerning the disposition of the State license fee in the event that the Tribes prevail in this litigation.

disrupt and further delay the orderly resolution of this action.

CONCLUSION

The proposed intervenors have not even attempted to make – and cannot make – any of the showings, explanations or justifications that L.R. 142(e) requires as conditions precedent to seeking and obtaining an order shortening time. For the reasons set forth above, the application to shorten time should be denied.

Dated: July 8, 1996

Respectfully Submitted,

FORMAN & PROCHASKA
Attorneys for the Sycuan Band
of Mission Indians

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs, v. PETE WILSON, as Governor of the State of California, the STATE OF CALIFORNIA, and the CALIFORNIA HORSERACING BOARD, Defendants.	CIV-S-90-1118 DFL DECLARATION OF GEORGE FORMAN IN OPPOSITION TO PROPOSED INTERVENORS' EX PARTE APPLICATION FOR ORDER SHORTENING TIME. DATE: August 9, 1996 TIME: 9:00 a.m. PLACE: Courtroom 3

BARONA AND VIEJAS)
BANDS OF OF [sic])
MISSION INDIANS,)
)
Plaintiffs in)
Intervention,)
)
v.)
)
PETE WILSON,)
GOVERNOR, et al.,)
)
Defendants.)
_____)

GEORGE FORMAN declares as follows:

1. I am a member in good standing of the Bar of the Supreme Court of California and of this Court. I am one of the attorneys of record for the Sycuan Band of Mission Indians in this action, and make this declaration on my own knowledge.

2. On June 28, 1996, I received via telecopier a letter bearing that date from Richard D. Martland. A copy of that letter is attached to Mr. Martland's declaration in support of the proposed intervenors' application to shorten time. Contrary to Mr. Martland's statement that he telefaxed this letter on June 27, both the telecopier cover sheet and the identifier printed by our fax machine show that the letter was sent on June 28.

3. At no time prior or subsequent to June 28, 1996 has Mr. Martland or anyone else associated with his law firm ever asked me to stipulate to shortening the time for hearing on the motion for leave to intervene.

3. [sic] Attached hereto as, respectively, Exhibit A, Exhibit B and Exhibit C, are true copies of an executed Operating Agreement among SCOTWInc., its member race tracks and the Sycuan Band of Mission Indians; a November 25, 1994 letter from SCOTWInc. to the Sycuan Business Committee; and a January 6, 1995 letter from me to SCOTWInc.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 8, 1996, at San Rafael, California.

/s/ George Forman
GEORGE FORMAN

EXHIBIT A

SIMULCAST AND PARIMUTUEL OPERATIONS AGREEMENT DAYLIGHT RACING

This Agreement is made this 17th day of October, 1990 by and between SOUTHERN CALIFORNIA OFF TRACK WAGERING, INC. ("Operator") the SYCUAN BAND OF MISSION INDIANS, a Federally Recognized Indian Tribe ("Tribe"), and EACH OF THE ORGANIZATIONS LISTED ON EXHIBIT A, during the period of their Race Meeting as set forth on Exhibit A ("Track").

WHEREAS, Tribe and the State of California have entered into a Tribal-State Compact ("Compact") which authorizes Tribe to operate a simulcast wagering facility for wagering on races conducted in the Central and Southern Zones of the State of California on Tribe's Reservation located in the Southern Zone of California; and

WHEREAS, Operator is an organization established under the provisions of Division 8, Aticle [sic] 9 of the California Business and Professions Code (the "Simulcast Wagering Laws") to operate and administer a simulcast wagering system and is authorized by the Compact to transmit Track's race program to Tribe; and

WHEREAS, Track operates a licensed race meeting in the Central or Southern Zone of the State of California during the period set forth on Exhibit A and desires its race program to be transmitted by Operator to Tribe for simulcast wagering pursuant to the provisions of the Simulcast Wagering Law and the Compact; and

WHEREAS, Track, Operator and Tribe desire to memorialize their various rights, duties and obligations by this Agreement,

NOW THEREFORE, it is agreed as follows:

1. Term of Agreement – The term of the Agreement shall be valid for the period commencing October 26, 1990 to December 25, 1991.

2. Duties and Responsibilities of Tribe

(a) Simulcast Facility – Tribe shall maintain a Simulcast Wagering Facility suitable for the operation of simulcast wagering and shall open its facility to the public for purposes of simulcast wagering on each racing program transmitted by Operator to Tribe unless otherwise agreed to by Track and Tribe.

(b). General Obligations of the Tribe – Tribe shall, in a manner and form suitable to Operator, furnish or maintain or cause to be furnished or maintained, at its

Satellite Wagering Facility, at no expense to operator or Track:

(1) Reasonable physical protection at all times of the simulcast wagering system components installed or present on the premises of Tribe from harm by any cause whatsoever including, but not limited to, trespass, damage, interference by other persons, vandalism or water damage. Such protection shall be afforded on a reasonable efforts basis and shall, among other things, provide such protection from the elements and fire extinguishing methods as are reasonably required to protect the same.

(2) Adequate secure Space for Totalisator equipment, a Totalisator room and money room of sufficient size, equipped with an adequate alarm system and appropriate safes, together with adequate office space for mutuel supervisors and facility supervisors.

(3) Teller windows having counters of sufficient size and structural strength to accommodate the parimutuel machines and of such design as to reasonably protect Tellers and the change funds of Tellers from unlawful conduct.

(4) Necessary electrical power, cable, outlets and voltage regulation for the proper, normal and emergency operation of the simulcast wagering system equipment, including without limitation a dedicated circuit to the parimutuel wagering terminals for simulcast operations.

(5) Tribe shall provide secure space for the storage and Care of printer ribbons, ticket materials and

other supplies of Operator reasonably necessary for the conduct of simulcast wagering operations as well as secure areas for the storage of spare or additional parimutuel wagering machines.

(6) Tribe will give Officers, directors, employees and the authorized representatives of Operator and their contractors access to all parts of the simulcast wagering system located on Tribe's property at all reasonable times for the proper supervision, maintenance, repair or operation of the system and to permit removal by Operator or its designated contractor of the removable parts of the system when not required or necessary for Satellite Wagering. No fees, charges or expenses or licensing fees shall be charged to Operator's personnel or contractors by Tribe, except that every person employed on the premises of Tribe's facility shall be required to obtain and possess and display a Tribal work permit Any of Operator's personnel in good standing with and currently and validly licensed by the California Horse Racing Board shall be qualified to receive, without charge, a Tribal work permit upon application therefor.

(c) Gates and Admissions – Tribe shall control public admissions to its simulcast wagering facility. The cost of labor, materials, and supplies associated with the construction, maintenance and operation of admission booths and facilities shall be the sole responsibility of Tribe. Tribe shall furnish on request accurate records of daily admissions and attendance totals to Operator.

(d) Parking – Tribe shall provide for the parking space reasonably necessary to accommodate the anticipated patrons at its simulcast wagering facility. The cost

of labor, materials and supplies associated with the construction, maintenance and operation of parking facilities shall be the sole responsibility of Tribe.

(e) Food and Beverage – Tribe shall maintain and establish reasonable food and beverage service of a form and nature satisfactory to Operator at its simulcast wagering facility. The costs of labor, materials and supplies associated with construction, maintenance and operation of food and beverage service shall be the sole responsibility of Tribe.

(f) Amenities and Facilities – Tribe shall, in a manner and form satisfactory to Operator, provide and maintain a clean, safe and habitable simulcast wagering facility suitable for public attendance. To the extent possible such facilities shall contain a clubhouse type area for those members of the public desiring enhanced facilities. The cost of all labor, materials and supplies associated with maintaining Tribe's simulcast wagering facility in a clean and orderly manner shall be the sole responsibility of Tribe.

(g) Security – Tribe shall, in a manner and form satisfactory to Operator, provide adequate security for the protection of the public and simulcast employees, including such uniformed and plainclothes security personnel as shall be reasonably necessary to protect the public and simulcast wagering facility from unlawful and improper acts. The cost of all labor, materials and supplies associated with security of the simulcast wagering facility shall be the sole responsibility of Tribe.

(h) Utilities – Tribe shall, in a manner and form satisfactory to Operator, provide such air conditioning,

electrical service, water, heat, and light as are reasonably necessary to maintain a proper simulcast wagering facility. The Cost of such utility services shall be the sole responsibility of Tribe.

(i) Receiving and Display Equipment – Tribe shall, in a manner and form satisfactory to Operator, acquire, maintain and provide proper down-link equipment to receive and display to the public the audio-video signal and wagering information transmitted by Operator from Track, including such wagering information boards and television monitors as are reasonably necessary to adequately display the audio-video signal to the public attending the simulcast wagering facility. In addition, Tribe shall display, where possible, publicly televised sports events for the viewing of the public. The cost of labor, equipment, materials and supplies associated with receiving and display of the audio-video signal shall be the sole responsibility of Tribe.

(j) Maintenance – Tribe shall be responsible for maintenance of the facility and all equipment therein, except the parimutuel and other equipment installed by Operator at each simulcast wagering facility pursuant to the Compact and Division 8, Article 9 of the Business and Professions Code.

(k) Price Lists – Tribe shall furnish Operator at least thirty days prior to each of the Race Meetings set forth on Exhibit A a price list setting forth the amounts to be charged to the public for attendance, parking, food and beverage services, programs, and all other vended items related to simulcast wagering. Except as to food and beverage prices Tribe shall give Operator written

notice as soon as commercially practical, but not less than five (5) days, of any proposed increases to any of the prices submitted.

(l) Generally – For purposes of this Agreement, the term "in a manner and form satisfactory to Operator" shall mean in a manner and form substantially similar to that of state licensed simulcast wagering facilities in the Southern Zone of the State of California. However, nothing herein shall be construed as requiring Tribe to subject itself to the laws, jurisdiction, regulations and/or policies of the State of California except as expressly provided in the Compact under which Tribe operates its simulcast wagering facility.

(m) Opening Approval – Prior to opening the facility to the public, Tribe shall obtain Operator's Consent, which Consent shall not unreasonably be withheld, to open the facility to the public and to commence the operation of its simulcase [sic] facility. Tribe shall not seek such consent until all proper equipment is installed and operational and the facility and all equipment therein meets the applicable standards established by the California Horse Racing Board.

3. Duties and Responsibilities of Track

(a) Racing Program – The Track shall make available a suitable audio-video signal of its daily racing program for transmission of that signal by Operator to Tribe. Such audio-video signal shall include at a minimum video coverage of each race, the audio call of the race by the track announcer, video presentation of the order of finish and parimutuel pay-offs, pre-race odds and probables, plus such additional pre- and post- race

audio coverage as are reasonably necessary to make the audio-video signal entertaining and informative.

(b) Audio-Video Signal – The Track shall provide such equipment as is reasonably necessary to deliver to Operator's on-track up-link facility an audio-video signal of such quality as is consistent with the requirements of the California Horse Racing Board and industry standards. The cost of all labor, equipment, materials and supplies associated with providing such audio-video signal shall be the sole responsibility of Track.

(c) Parimutuel Operation – The Track shall maintain such totalisator systems and operations as are consistent and compatible with those employed by Operator, and shall maintain such facilities as are reasonably necessary to accept and combine parimutuel data accumulated by Operator from Tribe's facility and other simulcast wagering facilities with Track's on-track parimutuel pool so that a single parimutuel pool can be established for wagers accepted on-track and at Tribe's and other simulcast facilities. Track shall employ a Parimutuel Manager for on-track parimutuel operations who shall additionally supervise the parimutuel operations at Tribe's simulcast facility as agent of the Operator at no Charge to Operator.

4. Duties and Responsibilities of Operator

(a) Racing Program – Operator shall provide to Tribe's facility for receipt through appropriate down-link equipment an audio-video signal of such quality as is consistent with the requirements of the California Horse Racing Board and industry standards. Such audio-video signal shall include at a minimum video coverage of each

race, the audio call of the race by the track announcer, video presentation of the order or finish and parimutuel pay-offs, pre-race odds and probables, as displayed at the Track plus such additional pre- and post- race audio coverage as are reasonably necessary to make the audio-video signal entertaining and informative.

(b) Audio-Video Transmission – Operator shall provide all equipment necessary to accept Track's audio-video signal and to encrypt and transmit via satellite the audio-video signal delivered by Track to Operator's On-track up-link station to Tribe's simulcast facility. Operator shall provide and install at Tribe's facility appropriate equipment to decode the audio-video signal. Operator shall insure that all of its personnel and subcontractors involved in the encryption, transmission and decoding of the audio-video signal shall comply with all applicable regulations of the Federal Communications Commission, the California Horse Racing Law (Business and Professions Code, Sections 19400, *et seq.*), the Compact and all applicable rules, licensing and technical requirements of the California Horse Racing Board. The cost of all labor, materials, supplies and services associated with the transmission of the audio-video signal to Tribe's facility shall be the sole responsibility of Operator.

(c) Parimutuel Operations – Operator shall engage as its agent the Parimutuel Manager of the Track to supervise the parimutuel operations at Tribe's simulcast facility. In addition, the Operator shall employ and supervise such qualified parimutuel operations management and personnel together with such equipment as is

reasonably necessary for the proper operation and management of the simulcast wagering system given the reasonably anticipated attendance and parimutuel wagering handle at Tribe's simulcast facility. The cost of all labor, materials, and supplies associated with the maintenance and operation of the parimutuel wagering facilities at Tribe's facility shall be the sole responsibility of Operator.

(d) Parimutuel Hub – Operator shall establish a Parimutuel Hub to receive all parimutuel information from all simulcast facilities, including Tribe's simulcast facility, and Combine the same into One parimutuel pool for transmission to Track for Consolidation into Track's on-track parimutuel pool. Except as hereinafter provided in Section 12, the cost of all labor, materials, equipment, maintenance and services, including all telephone and data lines from Tribe's simulcast facility to hub and from hub to Track, associated with the operation and maintenance of the parimutuel hub shall be the sole responsibility of Operator.

(e) Change Fund, etc. – Operator shall establish at Tribe's facility a sufficient Change fund so as to provide, at each parimutuel window in operation, the reasonably anticipated cash necessary to make change and payoffs. Operator shall be responsible for all handling of funds received by and through the parimutuel operation at Tribe's facility including the counting, accounting, and transportation of said funds. The Cost, materials, equipment and supplies associated with the provision, handling, accounting and transportation of all parimutuel funds shall be the sole responsibility of Operator.

5. Consideration.

(a) In General – Tribe shall be entitled to all revenues from parking fees, admissions, food and beverage services and all other commercial enterprises conducted at the Tribe's facility. Additionally, with respect to the gross amount of wagers accepted at the Tribe's facility on races run in California which are part of Track's racing program, Tribe shall be entitled to receive from Operator (i) a fee of 2% as a commission, and (ii) a fee equal to .33% as local government reimbursement.

(b) State License Fee – In the event that a final judicial determination is made that the State of California cannot impose its state license fee on wagers accepted at the Tribe's facility, Tribe shall be entitled to receive an amount equivalent to the state license fee on the gross amount of wagers accepted at the Tribe's facility. To the date of such final judicial determination, Tribe shall recover such fees from the State, thereafter, said fees shall be paid by Operator directly to Tribe if Operator is authorized by the State to withhold such sums from the gross amount of wagers accepted at the Tribe's facility and to make such payment directly to Tribe. Otherwise, Tribe shall recover such fees directly from the State.

(c) Interstate Races – Should Track simulcast a race run in another state (*i.e.*, Kentucky Derby, Breeder's Cup, etc.) the parties will separately negotiate the consideration to be paid Tribe on the wagers accepted on said races, and such consideration shall be the same as that paid by Operator to all other simulcast wagering facilities in the Central and Southern Zones.

(d) Remittance to Tribe – Operator shall remit all such sums on a periodic basis, but not less frequently than weekly, to Tribe, based upon the reports of wagering submitted to the California Horse Racing Board by the accountants designated by the Track and Operator and approved by the Board to make said reports.

(e) Retention by Operator – Reimbursement – Pursuant to the Simulcast Wagering Law, Operator shall deduct 2.5% of the gross amount of wagers on thoroughbred racing programs accepted at Tribe's facility and 6.0% of the gross amount of wagers on harness, quarter horse, Appaloosa, mixed breed or fair racing programs accepted at Tribe's facility. Should the amount so deducted prove insufficient to Cover the Operator's actual operating expenses at the Tribe's facility, then Tribe shall pay to Operator the amount by which such deductions shall fail to cover Operator's actual operating expenses. In the event of any disagreement as to the amount of Operator's actual Operating expenses under this provision, the amount shall be determined by the California Horse Racing Board

6. Programs – Unless Otherwise agreed, Track will provide to Tribe, at Track's facility at least four (4) hours prior to first post time, sufficient copies of track's daily racing program every day that such program is produced. Track and Tribe agree with respect to the distribution and sale of daily racing programs to the public that the net proceeds derived from the sale of such programs, after deduction of both Tribe and Track's costs of production, distribution and sale of said programs, shall be shared equally by Tribe and Track. In the event Track shall fail or otherwise be unable to meet its obligations to timely

supply an adequate number of programs to Tribe, the Tribe may, on written notice to Track, procure said programs from the California Authority of Racing Fairs ("CARF") and in which event Tribe shall not be required to share any profits from the sale of said programs with Track.

7. Advertising and Promotion – The 1% Promotion Fund, generated from the gross parimutuel handle at Tribe's facilities, shall solely be used for the purpose of advertising and promotion of parimutuel wagering of simulcast horse racing generally. At least 30 days prior to each race meeting, Track and/or Operator shall furnish Tribe a Budget for proposed advertising, promotions and publicity activities for all satellite facilities including Tribe's facility. Operator and Track further agree to establish a campaign to promote the entire simulcast wagering system by advertising and promotion directed to existing and prospective patrons of Tribe in an amount totalling not less than 90% of 1% of the gross wagering handle accepted at Tribe's facility for the Track's race program and to review said program with Tribe at least 20 days prior to Track's race meeting. As soon as reasonably practical, following the conclusion of a race meeting the Track and Operator shall provide Tribe an accounting of the promotion fund expenditures. Of the total amount available in the promotion fund, the Operator shall make available to Tribe, for the reimbursement of expenditure by Tribe, an amount of not less than 10% of 1% of the total wagers accepted by Tribe on Tracks race meeting (unless an amount greater than 10% of 1% is mutually agreed on by Track and Tribe). Tribe shall submit to the Operator a plan for the use of this local promotional fund

and following the race meeting shall submit, for the purposes of reimbursement, the invoices and substantiating material related to the expenditures. Any funds not used from the Promotion Fund shall be retained by Operator and carried over for promotion of the Track's next race meeting.

8. Insurance

(a) Operator – The Operator will, on request, provide certificates of insurance for, and will maintain, at its expense, insurance coverage with insurance companies having an A.M. Best rating of "A" or higher as follows:

(1) All risks of physical damage coverage on its operations and facilities subject to normal exclusions;

(2) Workers' compensation on the Operator's employees providing statutory benefits and an employer's liability limit of $100,000; and

(3) Comprehensive general liability coverage of not less than $1,000,000 combined single limit, which shall include extensions of coverage for products, complete operations, personal injury and blanket Contract.

(4) The Operator shall also maintain an excess line of comprehensive general liability coverage in such amounts that the Operator may deem appropriate.

(5) In each and all such policies, save and except the Workers' Compensation policy, Track and Tribe shall be additional insureds.

(b) Tribe. Tribe will, on request, provide certificates of insurance for, and will maintain, at their expense, insurance coverage with insurance companies having an A.M. Best rating of "A" or higher as follows or as a governmental entity, Tribe, after giving notice to Operator and Track, may self insure some or all of the following coverages or be covered by an insurance pool, where the risk is borne by insurance companies acceptable to the Operator:

(1) All risks of physical damage coverage on Tribe's facility subject to normal exclusions;

(2) Workers' compensation on the Tribe's employees providing statutory benefits and an employer's liability limit of $100,000; and

(3) Comprehensive general liability coverage of not less than $1,000,000 combined single limit, which shall include extensions of coverage for products, complete operations, personal injury and blanket contract.

(4) The Tribe shall also maintain an excess line of comprehensive general liability coverage in such amounts that the Tribe may deem appropriate.

(5) In each and all such policies, save and except the Workers' Compensation policy, Track and Operator shall be additional insureds.

(C) Track – The Track will, on request, provide Certificates of insurance for, and will maintain, at its expense, insurance coverage with insurance companies having an A.M. Best rating of "A" or higher as follows:

(1) All risks of physical damage coverage on its operations and facilities subject to normal exclusions;

(2) Workers' compensation on the Track's employees providing statutory benefits and an employer's liability limit of $100,000; and

(3) Comprehensive general liability coverage of not less than $1,000,000 combined single limit, which shall include extensions of coverage for products, complete operations, personal injury and blanket contract.

(4) The Track shall also maintain an excess line of comprehensive general liability coverage in such amounts that the Track may deem appropriate.

(5) In each and all such policies, save and except the Workers' Compensation policy, Operator and Tribe shall be additional insureds.

9. Liability to Tribe – Neither Operator nor Track shall be liable to Tribe for any losses of Tribe occasioned by interruption or loss of the audio-video or parimutuel signal or transmission, for whatever duration, except that Operator shall save and hold Tribe harmless from and against any claims of patrons or third parties relative to wagers made or claimed to be made and accepted through the parimutuel system. If Operator recovers any losses incurred as a result of interruption or loss of the audio-visual or parimutuel signal or transmission from a services supplier of Operator, the amount thereof shall be distributed to the Operator, Track and Tribe in proportion to their respective percentage interests in the satellite

parimutuel handle, but only to the extent that such recovery includes settlement of claims for losses of the Consideration due Tribe under Section 5 hereof.

10. Remedy for Failure to Accept Signal – In the event Tribe determines to suspend its operations for all or any portion of Track's Racing Meeting, it shall give prompt notice of such proposed suspension to CHRB, Operator and Track. In the absence of approval of the CHRB or the mutual agreement of Operator and Track as to such suspension or unless such operations are suspended for reasons beyond the control of Tribe or for reasons of public safety, Operator, with Track's consent, may suspend transmission of the audio-video signal to Tribe for the balance of the Racing Meeting.

11. Breach of Agreement – It shall be a material breach of this Agreement justifying the suspension of the audio-video signal to Tribe by Operator for the remaining term of this Agreement for Tribe to accept an audio-video signal for parimutuel wagering purposes, of any racing program which is not transmitted to Tribe by Operator or otherwise is not available, under the Simulcast Wagering Law, to all other simulcast wagering facilities within the county where the Tribe's facility is located.

12. Set Up Charges – Tribe shall reimburse Operator, within 30 days of presentation of an invoice therefor, for Operator's costs and expenses of installing telephone, tote, data, and voice transmission lines to Tribe's simulcast facility, and additionally, Tribe shall pay to Operator a consulting fee of $10,000 to compensate Operator for its time and expense in establishing Tribe's simulcast facility. Upon presentation of an invoice therefor, Tribe shall

within seven (7) days advise Operator which of the following three modes of payment it elects to utilize. In the absence of such advice within seven (7) days, Tribe shall be deemed to have elected to make payment by the method set forth in subparagraph (a)

(a) The sum of $10,000 payable thirty (30) days after Tribe's simulcast facility is operational (the "Opening Date"), $9,000 of which shall be refunded to Tribe if Tribe's simulcast facility remains in operation for twelve (12) consecutive months or, at Tribe's election;

(b) The payment of $1,000 to Operator not more than ten (10) days after Tribe's simulcast facility is operational, together with delivery to Operator of an Irrevocable Standby Letter of Credit in the principal sum of $9,000, payable to Operator, upon Operator filing documents in appropriate form with the issuer of such Standby Letter of Credit that Tribe's simulcast facility has ceased simulcast operations, otherwise, said Standby Letter of Credit shall expire on the first anniversary of the Opening Date or, at Tribe's election;

(c) The payment of $1,000 to Operator not more than ten (10) days after Tribe's simulcast facility is operational, together with the establishment of an escrow account at a federally insured bank in the principal amount of $9,000 with instructions to the escrow to pay all sums in said account less the escrow's fees to Operator upon Operator filing a sworn statement with said escrow that Tribe's simulcast facility has ceased simulcast operations, otherwise, to Tribe on the first anniversary of the Opening Date.

13. Miscellaneous Provisions

(a) Prohibition of Parimutuel Wagering – If at any time during the term of this Agreement parimutuel wagering on racing or simulcast wagering is made, declared, or held to be illegal or prohibited by applicable statute or decision of a court of last resort and competent jurisdiction, which decision has become final, or by any other competent public authority whose decision is final and not appealable, then this Agreement shall thereupon be deemed terminated and the parties hereto shall be released from any and all further liability or obligation hereunder, provided however that such termination shall not relieve Operator, Track, or Tribe from any obligation or liability that accrued prior to the date of such termination.

(b) Third Party Liability

(1) Operator. Operator will assume responsibility for the defense of, and will indemnify and hold harmless Track and Tribe, their directors, officers, shareholders, employees, representatives and agents from and against any losses, claims, damages, costs, suits, penalties, demands or liabilities, except claims of Operator's employees for personal injuries arising in the scope of their employment, including reasonable legal counsel fees, occasioned by or arising out of, in whole or in part, any willful or negligent act or omission of Operator or any of its contractors, subcontractors, agents, servants or employees, provided that immediate written notice of such claim or suit is given to Operator by Track or Tribe, as the case may be, and provided Operator is given full control over all negotiations and litigation in connection

therewith, including selection of counsel. Operator will not be responsible for settlements made or costs incurred without its prior written consent.

(2) Track. Track will indemnify and hold harmless Operator and Tribe, their directors, officers, shareholders, employees, representatives and agents from and against any losses, claims, damages, costs, suits, penalties, demands or liabilities, except claims of Track's employees for personal injuries arising in the scope of their employment, including reasonable legal counsel fees, occasioned by or arising out of, in whole or in part, any willful or negligent act or omission of Track or any of its contractors, subcontractors, agents, servants or employees, provided that immediate written notice of such claim or suit is given to Track by Operator or Tribe, as the case may be, and provided Track is given full control over all negotiations and litigation in connection therewith, including selection of counsel. Track will not be responsible for settlements made or costs incurred without its prior written consent.

(3) Tribe. Tribe will indemnify and hold harmless Operator and Track, their directors, officers, shareholders, employees, representatives and agents from and against any losses, claims, damages, costs, suits, penalties, demands or liabilities, except claims of Tribe's employees for personal injuries arising in the scope of their employment, including reasonable legal counsel fees, occasioned by or arising out of, in whole or in part, any willful or negligent act or omission of Tribe or any of its contractors, subcontractors, agents, servants or employees, provided that immediate written notice of such claim or suit is given to Tribe by Operator or Track,

as the case may be, and provided Tribe is given full control over all negotiations and litigation in connection therewith, including selection of counsel. Tribe will not be responsible for settlements made or costs incurred without its prior written consent.

(c) Independent Contractor – Operator, Track and Tribe each agree that they are not joint venturers or partners and their status as to one another is, for the purpose of this Agreement, independent contractors and that neither they nor any of their contractors, subcontractors, agents or employees shall, at any time, constitute agents or employees of the other. Neither Operator, Track nor Tribe is granted any right or authority to assume or create any obligation or liability, express or implied, on behalf of each other or to bind each other in any manner or thing whatsoever.

(d) Liability of Tribe – Tribe shall not be liable, absent active negligence or affirmative misconduct, for any loss of funds of Operator held at Tribe's Facility.

(e) Compliance with Law – The parties agree that they will comply with any and all applicable laws, rules and regulations of the United States of America and the State of California, including those laws, regulations and rules specifically applicable to horse racing and simulcast wagering, except that such State laws, regulations and rules shall apply to Tribe only to the extent that such provisions expressly are made applicable to Tribe by the Compact. During the term hereof, Operator, Track and Tribe shall maintain their respective good standing with the California Horse Racing Board.

(f) Hiring Policy – In recognition of the Tribal objective to provide stable, long-term employment to its members, the parties hereto agree that Operator shall give preference in hiring and promotion to qualified members of Tribe to the extent that any such preference is not precluded by the then-existing collective bargaining agreement between Operator and such union as is representing the parimutuel clerk employees of Operator. However, nothing herein shall be construed as requiring Operator to enter into any agreement with any labor organization.

(g) Governing Law – The Compact, applicable federal law and the laws of the State of California and, in particular, the Simulcast Wagering Law, and the applicable regulations promulgated thereunder by the California Horse Racing Board shall govern as to the interpretation, validity and effect of this Agreement. Except as provided herein, no conflict of law principle shall make the substantive law of any other state or jurisdiction applicable hereto. In the event of any further amendments to the Compact or the California Horse Racing Law in the above-referenced Code sections, or the regulations promulgated by the California Horse Racing Board after the date hereof, the parties hereto agree to negotiate in good faith any necessary or advisable modifications to this Agreement which may be legally required or which the parties mutually agree are advisable.

(h) Attorneys' Fees – In the event suit is brought to enforce or interpret any part of this Agreement, the prevailing party shall be entitled to recover, as

an element of its cost of suit and not as damages, reasonable attorneys' fees to be fixed by the court. The prevailing party shall be the party who is entitled to recover its cost of suit whether or not the suit proceeds to final judgment. No sum for attorneys' fees shall be counted in calculating the amount of a judgment for purposes of determining whether a party is entitled to recover its attorneys fees, and the only Tribal asset from which any award of fees or costs hereunder may be satisfied shall be the revenue from the Tribe's Simulcast Wagering Facility.

(i) Notices – All notices required by provisions of this Agreement shall be in writing and sent, postage prepaid, by overnight courier or U. S. Postal Service Express Mail, personal delivery or via telefax.

To Track to:
The Addressees Set Forth on Exhibit A

To Operator to:
Southern California Off Track Wagering, Inc.
4961 Katella Avenue
Los Alamitos, California 90720
Attention: Alvin A. Karwacki, General Manager

With copy to:

Robert Forgnone, Esq.
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071

To Tribe to:
Sycuan Band of Mission Indians
5459 Dehesa Road
El Cajon, California 92021
Attention: Tribal Administrator

With Copy to:

Alexander & Karshmer
1900 Addison Street #200
Berkeley, California 94704

(j) Entire Agreement – This Agreement shall be deemed to include and incorporate the entire Agreement by and between the parties and may be amended, modified or superseded only by an instrument in writing.

(k) Counterparts – This Agreement may be executed in any number of counterparts, each of which may be deemed an original and all of which shall constitute a single document.

(l) Titles and Captions – Section titles, captions and numbers are provided for each section or subsection only as a matter of reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision herein.

WHEREFORE, the parties hereto have set their hand the date first above written.

TRIBE

SYCUAN BAND OF MISSION INDIANS

By /s/ Anna Sandoval
Anna Sandoval

Title Spokesperson

OPERATOR

SOUTHERN CALIFORNIA OFF TRACK WAGERING, INC. ("Operator")

By /s/ Alan A. Karwacki

Title GEN. MANAGER

TRACK

LOS ANGELES TURF CLUB

By /s/ Clifford C. Goodrich

Title PRESIDENT

TRACK

HOLLYWOOD PARK OPERATING COMPANY

/s/ Donald M. Robbins

By /s/ Donald M. Robbins

Title EXEC. V.P.

TRACK

DEL MAR THOROUGHBRED CLUB

/s/ Joseph W. Harper

By /s/ Joseph W. Harper

Title PRESIDENT

TRACK

LOS ANGELES COUNTY FAIR

_____

By _____

Title _____

TRACK

OAK TREE RACING ASSOCIATION

_____

By _____

Title _____

TRACK

HOLLYWOOD PARK FALL OPERATING COMPANY

/s/ Donald M. Robbins

By /s/ Donald M. Robbins

Title EXEC. V.P.

TRACK

DEL MAR THOROUGHBRED CLUB

_____

By _____

Title _____

TRACK

LOS ANGELES COUNTY FAIR

/s/ Ralph M. Hinds

By /s/ Ralph M. Hinds

Title President/CEO

TRACK

OAK TREE RACING ASSOCIATION

_____

By _____

Title _____

TRACK

HOLLYWOOD PARK FALL OPERATING COMPANY

/s/ Donald M. Robbins

By /s/ Donald M. Robbins

Title EXEC. V.P.

TRACK

DEL MAR THOROUGHBRED CLUB

_____

By _____

Title _____

TRACK

LOS ANGELES COUNTY FAIR

_____

By _____

Title _____

TRACK

OAK TREE RACING ASSOCIATION

/s/ R.M. Rogers

By /s/ Raymond M. Rogers

Title Executive Vice-President

TRACK

HOLLYWOOD PARK FALL OPERATING COMPANY

/s/ Donald M. Robbins

By /s/ Donald M. Robbins

Title EXEC. V.P.

TRACK

DEL MAR THOROUGHBRED CLUB

_____

By _____

Title _____

TRACK

LOS ANGELES COUNTY FAIR

_____

By _____

Title _____

TRACK

OAK TREE RACING
ASSOCIATION

_____

By _____

Title _____

TRACK

HOLLYWOOD PARK FALL
OPERATING COMPANY

/s/ Donald M. Robbins

By /s/ Donald M. Robbins

Title EXEC. V.P.

EXHIBIT A

Track	Race Meet Location	Racing Meeting
LOS ANGELES TURF CLUB P.O. BOX 808 ARCADIA, CA 91066 (818) 574-7223 Attn: Clifford C. Goodrich President and Chief Operating Officer	SANTA ANITA PARK	12/26/90 - 4/22/91
HOLLYWOOD PARK OPERATING COMPANY P.O. BOX 369 INGLEWOOD, CA 90306 (213) 419-1500 Attn: Marjorie L. Everett Chairman of the Board and Chief Executive Officer	HOLLYWOOD PARK	4/24/91 - 7/22/91
DEL MAR THOROUGHBRED CLUB P.O. BOX 700 DEL MAR, CA 92014 (619) 755-1141 Attn: Joseph W. Harper President and General Manager	DEL MAR RACE TRACK	7/24/91 - 9/11/91

LOS ANGELES COUNTY FAIR ASSOCIATION P.O. BOX 2250 POMONA, CA 91769 (714) 623-3111 Attn: Ralph M. Hinds President and Chief Executive Officer	FAIRPLEX PARK	9/12/91 - 9/30/91
OAK TREE RACING ASSOCIATION P.O. BOX 808 ARCADIA, CA 91066 (818) 574-6345 Attn: Raymond M. Rogers Executive Vice President	SANTA ANITA PARK	Thru 11/12/90 10/2/91 - 11/11/91
HOLLYWOOD PARK FALL OPERATING COMPANY P.O. BOX 369 INGLEWOOD, CA 90306 (213) 419-1500 Attn: Marjorie L. Everett Chairman of the Board and Chief Executive Officer	HOLLYWOOD PARK	11/14/90 - 12/24/90 and 11/13/91 - 12/24/91

EXHIBIT B

[logo]*Southern California*
Off-Track Wagering, Inc.

November 25, 1994

Mr. Daniel Tucker, Chairman, Tribal Business Committee
Sycuan Band of Mission Indians
5459 Dehesa Road
El Cajon, CA 92019

RE: Simulcast and Parimutuel Operations Agreement

Dear Mr. Tucker:

As you know, the Simulcast and Parimutuel Operations Agreements for the 1994 racing year (the "Simulcast Agreements"; capitalized terms contained herein have the meaning set forth in the Simulcast Agreements) by and among Southern California Off-Track Wagering, Inc. ("Operator"), the Sycuan Band of Mission Indians ("Tribe") and each of the organizations listed on Exhibits A thereto during the period of their racing meet ("Track"), expire at the end of the race meets currently in progress (December 17, 1994 for Night Racing and December 24, 1994 for Daylight Racing). In connection with the upcoming negotiations regarding the renewal of the Simulcast Agreements, Operator proposes that Section 5(b) of the Simulcast Agreements be deleted in its entirety.

In the event Tribe's challenge to the permissibility of the state license fee deducted for the total wagers at Tribe's simulcast facility is successful, Operator does not agree to be obligated to pay to Tribe an amount equal to such state

license fee. Whether Tribe is entitled to receive an amount equal to the state license fee is solely a matter between Tribe and the State of California. Tribe should, as required by the Compact, look to the State of California for any such payment and not to Operator. In fact, a requirement that Operator make such payment is inconsistent with the terms of the Compact.

Furthermore, under the California Horse Racing Law, if the State of California cannot impose its state license fee on wagers accepted at Tribe's facility, the amount deducted for such fee would be surplus revenue to be divided equally between the applicable racing association and the horsemen. Operator does not believe that the California Horse Racing Board (in its capacity as the Compact negotiator for the State of California) has the right or authority to unilaterally change the operation of the California Horse Racing Law (i.e. by negotiating away revenue that otherwise would have been shared between the applicable racing association and the horsemen) without proper legislative action.

Operator looks forward to another year of operating and administering the simulcast wagering system at Tribe and to finalizing the renewal of the Simulcast Agreements with you shortly. If you have any questions regarding the matters discussed herein please do not hesitate to call me at (714) 761-1660.

Very truly yours,

/s/ Alvin A. Karwacki
Alvin A. Karwacki
General Manager

cc: George Forman Craig Fravel Lawrence Goldman
LMG/ajc

EXHIBIT C

ALEXANDER & KARSHMER

ATTORNEYS AT LAW
(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)

2150 SHATTUCK AVENUE, SUITE 725

BERKELEY, CALIFORNIA 94704

(510) 841-5056

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BARBARA E. KARSHMER*
PAUL ALEXANDER**
GEORGE FORMAN
JOHN R. SHORDIKE
PATRICIA A. PROCHASKA
RICHARD A. CROSS

*A PROFESSIONAL CORPORATION
**DISTRICT OF COLUMBIA BAR ONLY

1790 LANIER PLACE, N.W.
WASHINGTON, D.C. 20009
(202) 797-2548
TELECOPIER
(202) 797-2550

January 6, 1995

VIA TELECOPIER AND U.S. MAIL

Alvin A. Karwacki, General Manager
SCOTWINC
4961 Katella Avenue
Los Alamitos, CA 90720-2799

Re: Simulcast and Parimutuel Operations Agreement

Dear Mr. Karwacki:

In your November 25, 1994 letter concerning the renewal of the Simulcast Agreements for the coming racing year, you proposed that Section 5(b),[1] pertaining to the contingent Tribal entitlement to an amount equivalent to the State license fee, be deleted in its entirety, because in the event that the Tribal challenge to the applicability of the State license fee on wagers placed at Tribal facilities is successful,[2] SCOTWINC "does not agree to be obligated to pay to Tribe an amount equal to such state license fee."

Your letter gave four justifications for SCOTWINC's position:

1) the Tribe must look to the State for such payment, rather than to SCOTWINC, as required by the Compact;

2) requiring SCOTWINC to make such payment would be inconsistent with the terms of the Compact;

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[1] In the event that a final judicial determination is made that the State of California cannot impose its State license fee on wagers accepted at Tribe's facility, Tribe shall be entitled to receive an amount equivalent to the State license fee on the gross amount of wagers accepted at Tribe's facility. To the date of such final judicial determination, Tribe shall recover such fees from the State; thereafter, said fees shall be paid by Operator directly to Tribe if Operator is authorized by the State to withhold such sums from the gross amount of wagers accepted at Tribe's facility and to make such payment directly to Tribe. Otherwise, Tribe shall recover such fees directly from the State.

[2] The Cabazon and Sycuan Compacts specifically authorized the Tribes to bring their respective lawsuits.

3) if the State cannot impose its license fee, that amount would be "surplus revenue" that should go to the host association and the horsemen; and

4) SCOTWINC does not believe that the CHRB has the right or authority to unilaterally change the operation of the Horse Racing Law without proper legislative action.

We have consulted with legal counsel for the other Tribes that now have Agreements with SCOTWINC, and all concur in our opinion that SCOTWINC's request for deletion of Section 5(b) lacks any basis in law or fact, and thus that Section 5(b) should not be deleted at this time. Indeed, it seems clear to us that once the existing litigation between the State and the Tribes terminates in the Tribes' favor, that Section will need to be revised to affirmatively provide that SCOTWINC shall deduct and pay over to the Tribes the amounts that otherwise would be deducted and paid to the State as license fees.

The Simulcast Agreements do not exist in a void; rather, they must be understood and interpreted in the context in which they were made. In this case, that context includes not only the Horse Racing Law, but also the Tribal-State compacts that were entered into between the Tribes and the State, and which were approved by the Secretary of the Interior. This is a critical point, because in the absence of the compacts – which are authorized and approved pursuant to *federal* law – the Tribes would not be legally entitled or able to operate simulcast wagering facilities at all.

The authority for the Tribes to enter into agreements with, *inter alia*, SCOTWINC to receive simulcast signals

and conduct parimutuel wagering on simulcast races is conferred in Article 8(A), which specifically admonishes that,

> No such simulcast organization shall refuse to enter into such an agreement with [the Tribe] on the ground that [the Tribe] is not an entity eligible to be authorized to operate a simulcast wagering facility under state law, or that the proposed agreement with [the Tribe] is otherwise inconsistent with another provision of state law, or with the Rules and Regulations of the Board, *as long as the proposed agreement between [the Tribe] and the simulcast organization complies with federal law and with the terms of this Compact*- . . . . Except as herein provided, nothing in this Compact is intended to alter in any way the rights of the simulcast organization under state law. [Emphasis added].

The meaning and intent of this section of the Compacts could not be clearer: to the extent that federal law and/or Compact provisions differ from State law in defining SCOTWINC's relations with the Tribes, federal law and/or Compact provisions will control that relationship. Thus, under the Compacts, SCOTWINC would have no right to refuse to enter into an agreement with a Tribe, or to include a particular provision in a Simulcast Agreement, merely because entering into an Agreement or agreeing to a particular provision is not authorized by State law, as long as it is not contrary to federal law or the controlling Compact.

Article 19(A) of the Compacts provides that "*Subject to subparagraphs (B) and (C) below,* the amounts deducted

from parimutuel wagers at [Tribal facilities], and the distribution of such amounts, shall be the same as provided for under state law for simulcast wagering facilities, other than fairs, in the southern zone." The critical subparagraph (B)(3) provides that if the Tribes prevail in their lawsuit about the State license fee, the State is to pay over to the Tribes all license fees previously distributed to the State (exclusive of a negotiated assessment for actual regulatory costs), and the Tribes "shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility." In other words, if the Tribes prevail, the *distribution* of the amounts deducted from wagers at Tribal facilities will be adjusted so that the amounts previously deducted and paid over to the State as license fees instead will be deducted and paid over to the Tribes, less an agreed amount to reimburse the State for its regulatory costs.[3]

Based upon the clear language of the Compacts, SCOTWINC's contention that each Tribe's entitlement to receive an amount equal to the State license fee "is solely a matter between Tribe and the State of California[,]" simply is incorrect, as is SCOTWINC's contention that the payment over to the Tribes of amounts equal to the State license fee would be inconsistent with the terms of the Compacts.

The same flaws fatally infect SCOTWINC's contention that if the State cannot impose its license fee on

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[3] This assessment is to be separately negotiated between the State and the Tribes. The manner in which payment will be made is to be resolved in those negotiations.

wagers accepted at the Tribal facilities, the amounts deducted for such fees would be "surplus revenue to be divided equally between the applicable racing association and the horsemen." Because the Compacts require that money otherwise distributable to the State as a license fee must be paid over to the Tribes, there is no "surplus revenue" to be divided between the applicable racing association and the horsemen.

The California Horse Racing Board has been authorized by the Legislature to represent the State in negotiating compacts with Tribes concerning horseracing activities. Bus. & Prof. Code § 19445. Each of the compacts now in effect was negotiated by the CHRB with the able assistance of the Attorney General; each was signed by the Governor; and each was approved by the Secretary of the Interior pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d). Thus, as a matter of both State and federal law, those compacts now control the conduct of simulcast wagering activities on the Indian lands of the signatory Tribes, and under both the Supremacy Clause of the U.S. Constitution, Art. VI, Cl. 2, and the laws and regulations of the State of California, those compacts apply to and are binding on SCOTWINC, the racing associations, the racing fairs and the horsemen.

For all of the reasons set forth above, we look forward to promptly receiving from SCOTWINC new Agreements that continue to include Section 5(b), so as to ensure no interruption in the constructive working relationship that the parties heretofore have developed and maintained. If you feel that a meeting among legal counsel would help to resolve this issue, please let us know,

and we would be happy to help coordinate such a meeting.

Very truly yours,

ALEXANDER & KARSHMER

/s/ George Forman
George Forman

GF:ab
cc: Art Bunce, Esq.
Glenn Feldman, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

On Appeal from the United States District Court
for the Eastern District of California
No. CIV-S-90-1118 DFL
The Honorable David E. Levi, Judge

OPENING BRIEF OF APPELLANT RACING ASSOCIATIONS (PROPOSED DEFENDANT INTERVENORS)

(Filed Nov. 29, 1996)

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STATEMENT OF JURISDICTION

1. *District Court Jurisdiction.* The District Court based jurisdiction on "IGRA and 28 U.S.C. secs. 1331 and 1362." CR 74: 9.

2. *Finality.* This Court has jurisdiction pursuant to 28 U.S.C. 1291 in that the District Court (1) denied the proposed defendant-intervenor racing associations' motion to intervene and (2) granted the tribes' motion for summary judgment thereby finally deciding all the claims raised by the parties.

3. *Date of Order Appealed.* The motion to intervene was denied on July 11,1996, ER 20-21, proposed defendant-intervenor racing associations timely filed their Notice of Appeal 15 days thereafter, on July 26, 1996. The Notice of Appeal is therefore timely under F.R.A.P. 4(a). ER 27-30.

STATEMENT OF ISSUES

1. Did the District Court err in denying the racing associations' motion for intervention as untimely, notwithstanding the fact that the motion was filed shortly after the District Court ruled that the compacts negotiated between the State of California and the tribes required the State to continue imposing a tax from the racing associations but pay those monies to the tribes?

2. Does a tribal-state compact which provides that the tax monies collected by the State of California from the racing associations' off-track wagering revenues be paid to the tribes constitute an unlawful taking of the racing associations' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and of Article I, section 7 of the California Constitution?

INTRODUCTION

Until the issuance of this Court's October, 1994 opinion, the significance of this case for the proposed defendant-intervenor appellants – California racing associations who operate racetracks in the State and the organization responsible for transmitting the satellite signal of horse races to off-track locations – was whether the State of California was improperly taxing Indian tribes for the wagers placed at off-track wagering facilities located on Indian lands[1]. The answer to this question

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[1] The racing associations are Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and the Los Angeles County Fair. The organization responsible for the satellite signal for the horse races these racing associations transmit to off-track

seemed obvious to the racing associations, because since the advent of satellite wagering in California, less than a decade ago, these associations have paid a license fee to the State for wagers made on their horse races which were placed at all off-track locations. The satellite wagering license fee, which is calculated as a percentage of the wager itself, is a different fee than that imposed on wagers placed directly at the race track, but is nonetheless paid to the State by the racing association conducting the live racing meet.[2]

After the District Court's decision following remand by this Court, however, the question is no longer whether the State is taxing Indian tribes. Rather, the question now posed to this Court is whether the State has the authority to deprive the racing associations of their statutory entitlement to all residual revenues not distributed pursuant to the terms of the horse racing law by taxing the racing associations on revenues earned at tribal facilities and giving that money to the tribes. Merely phrasing the question makes the answer appear self-evident; if the State license fee is invalid under federal law, the State cannot constitutionally agree to continue to collect it out

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facilities is the Southern California Off-Track Wagering, Inc. (SCOTWINC).

[2] As with all off-track wagers, those placed at the tribal facilities are combined in the parimutuel pool generated by other off-track locations and with on-track wagers. It is out of this pool that winners are paid and various distributions are made, both to the racing associations and horse owners, and to the guest facilities, the State, and various other designated entities. Cal. Bus. and Prof. Code secs. 19605.7 and 19605.71.

of revenues belonging to the racing association for the benefit of the tribes.

The racing associations contend that, although the State may have never intended to enter into such an agreement, the decision of the District Court, which interprets this Court's October, 1994 opinion and construes the tribal-state compacts, requires the State to unconstitutionally deprive the racing associations of their property. It was for this reason that the racing associations attempted to intervene in the District Court proceedings while that Court was considering the State's motion for reconsideration of its order directing that the tax revenues, which would otherwise be the property of the racing associations, be paid to the tribes.

Notwithstanding the serious constitutional questions raised by the District Court's decision, and the fact that the Court's decision represented the first instance in which the racing association's property interests were directly affected, the District Court ruled that the intervention motion was untimely. As discussed below, the District Court's ruling misconstrued the nature of this Court's earlier ruling. As a result of the District Court's error, it improperly denied the racing associations' motion to intervene. Unless the compacts are ruled to be invalid or unenforceable, intervention is necessary to protect the associations' property interests, viz., the revenues the State continues to collect under the compulsion of its taxing authority and then gives to the tribes. This appeal seeks the assistance of this Court in clarifying its earlier decision and permitting the racing associations to intervene in this matter in order to assert their constitutional

claims in support of their property interests at stake in this litigation.

I. STATEMENT OF THE CASE AND STATEMENT OF FACTS.

A. Statement of the Case.

Following the earlier decision of this Court in *Cabazon v. Wilson*, 37 F.3d 430 (9th Cir. 1994), the United States District Court for the Eastern District of California considered several issues on remand. Although the District Court enjoined the State from terminating the satellite wagering signal pending the outcome of the remand proceedings, the District Court also held that the tribes could not obtain an order requiring the State to pay over the disputed tax revenues based on the complaints then on file. CR 74.[3] The District Court required that amended complaints be filed alleging the State to have breached the tribal-state compacts before it would consider the tribes' request for such an order. (*Ibid.*)

The original complaints in this matter were filed by two of the instant appellees: the Cabazon Band of Mission Indians and the Sycuan Band of Mission Indians. CR 1. Pursuant to the District Court's July 12, 1995 order after remand, those two tribes filed amended complaints. CR 74, 95 and 96. Subsequently, the Viejas Band of Mission Indians and the Barona Band of Mission Indians moved

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[3] All references to the Clerk's Record in this matter will be styled as "CR" with the document and page number, if any, following. References to the Excerpt of the Record will be styled as "ER", in the same format as the Clerk's Record.

to intervene and were permitted to file complaints in this matter. CR 102 and 101.[4] Although none of the new complaints actually alleged that the State had breached the compacts, each of the complaints sought an order from the District Court, based on assertions as to the import of this Court's October, 1994 decision, requiring the State to turn the previously-collected tax revenues over to the tribes. (*Ibid.*).

In answering these new complaints, the State raised several affirmative defenses and counterclaims, including the assertion that the racing associations were indispensable parties to any action in which the District Court was asked to construe the tribal-state compacts to require the State to tax the racing associations and pay those revenues to the tribes. CR 98. Although requiring the filing of the amended complaints, in part to consider the State's response to the allegation that the tribes were entitled to an order requiring the taxed racing association revenues to be paid to them CR 74: 13, the District Court nonetheless granted the tribes' motions to strike *all* of the States' affirmative defenses and to dismiss *all* of the State's counterclaims, including the claim that the racing associations are indispensable parties. ER 1-19.

The State moved for reconsideration CR 118. and the racing associations then moved to intervene. CR 125. Both the motion for reconsideration and the motion for intervention were denied. CR 133, 134. As a result, the District Court heard no evidence concerning the State's defenses

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[4] The four Indian tribes who are appellees in this matter will be collectively referred to as the "tribes."

and counterclaims, nor did it hear from the entities from which the tax was collected, before it issued an order requiring the State to pay to the tribes the tax revenues it had collected from racing associations' revenues.

The racing associations timely filed their appeal from the denial of the motion to intervene and also requested this Court stay the District Court's order requiring the State to pay to the tribes the tax revenues collected from the racing associations. CR 135, motion for stay (July 30, 1996). This Court denied the motion for stay filed by the racing associations, but granted the stay request filed by the State.

B. Statement of Facts.

The genesis of this current dispute lies in the fact that the State of California and the several Indian tribes who are appellees in this case entered into tribal-state compacts pursuant to the federal Indian Gaming Regulatory Act ("IGRA").[5] The compacts, which IGRA mandates as a prerequisite to most gambling on Indian lands, permitted the tribes to seek a contract from the state horse racing associations who conduct racing meets at racetracks in the State and become participants in the state-run system of parimutuel wagering on horse racing. CR 19: Exhibit 1, 2.

Pursuant to the provisions of the California Horse Racing Law[6], and under the supervision of the California

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[5] 25 U.S.C. secs. 2701, et seq.

[6] Cal. Bus. & Prof. Code secs. 19400, et seq.

Horse Racing Board (CHRB), five of the six proposed intervenors conduct horse racing meets in California and transmit a signal of the meet to satellite wagering facilities both within California and to locations out of state. Under the Horse Racing Law, the racing associations are licensed to conduct race meets at private racetracks and fair racetracks to which the CHRB has assigned specific racing dates. Bus. & Prof. Code secs. 19480-19849; 19530-19535.

The sixth proposed intervenor is Southern California Off-Track Wagering, Inc. (SCOTWINC). The Horse Racing Law permits the racing associations and racing fairs to form simulcast organizations to operate the satellite wagering equipment and parimutuel system. The purpose of the organization is to permit the associations providing the audiovisual signal "the ability to do so without undue burden and expense, to avoid unnecessary duplication of facilities, to permit the associations to protect the security of their signals . . . [and] the integrity of their parimutuel pools and to account for wagering proceeds included in the parimutuel pools. Cal. Bus. & Prof. Code sec. 19608.2(a). Any such organization must provide "meaningful representation" on its governing board to horsemen's organizations who contract with the racing associations and to non-racing fairs who operate a satellite wagering facility. Cal. Bus. & Prof. Code sec. 19608.2(d). The simulcast organization created by racing associations and fairs located in the "southern zone" of the State which is (defined in Cal. Bus. and Prof. Code sec. 19530.5 and in which all the Tribes who are parties to this litigation are located is known as SCOTWINC.

The proposed intervenor racing associations and the horsemen (who are represented here through the intervention of SCOTWINC), have alleged a property interest in any past and future monies derived from satellite wagering that is not distributed to others pursuant to the provisions of the Horse Racing Law. The allegation is based on the fact that the associations and horsemen share equally (with some variation depending on the breed of horse being raced) in all revenues from off-track wagering that are not returned to the betting patrons or distributed to various entities by the Legislature. Cal. Bus. & Prof. Code sec. 19605.8.[7]

If successful in their contract negotiations with the racing associations, the tribal-state compacts contemplated that the tribes would become race track "guest facilities," at which racing patrons could view and wager on live horse races. Although they agreed that the tribes could seek contracts permitting them to participate in the state-regulated system, the State and the tribes could not agree on the state's collection of a license fee (tax) from wagers placed at tribal locations. Thus, rather than refuse to conclude the compacts, the State consented to the tribes' filing of a declaratory relief action contesting the state tax. CR 19, Exhibit 1 and 2; CR 74: 3-4, n.1.

Despite the fact that state law requires the racing associations, rather than the guest facilities, to pay the State a license fee on off-track wagers Cal. Bus. and Prof. Code sec. 19605.7(1) and 19605.71(d), the tribes framed

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[7] For brevity's sake, the several racing associations, the horsemen, and SCOTWINC will collectively be denominated as the "racing associations" throughout this brief.

their initial complaint in this matter as a question of whether the State was imposing, either directly or indirectly, a tax on the tribes themselves. CR 1. The District Court's original decision rejected the tribes' contention and held that state law established – as with the license fee imposed on all other off-track wagers – that the fee was imposed on the racing associations operating the race tracks. The District Court found also that the tribes did not pay this tax and were not responsible to the State if the tax was not paid. *Cabazon v. Wilson*, 788 F.Supp. 1513, 1517, E.D.Cal. 1993; CR 26. Moreover, the record in this case establishes that the amount the tribes were paid for becoming off-track wagering locations (a commission amount calculated as 2% of the wagers placed at the tribal location, which is the same percentage paid to all off-track locations in the State) was untaxed by the State of California. *Id.* at p. 1515; CR 19, Exhibits 1 and 2.

In considering the tribes' appeal, this Court agreed with the District Court that the state license fee was imposed on the racing associations, rather than the tribes. Nonetheless, this Court's earlier decision invalidated the tax on federal preemption grounds, holding that the federal interest expressed in IGRA's intent language that the tribes be "primary beneficiaries" of gambling on their lands was undermined by application of the state license fee statute because the State's license fee share was greater than the tribes' commission. This Court also noted that, although the tribes did not pay the tax, they were nonetheless "burdened" by it because, unless the tribes prevail in the litigation, they won't receive the tax revenues.

The tax revenues collected thus far, or at least to the date of the District Court's second opinion, total approximately $11 million. See, Motion for Stay filed by the State of California, Declaration of Manuel M. Medeiros.

SUMMARY OF ARGUMENTS

I. The District Court improperly denied the racing associations' motion for intervention as untimely. The racing associations' motion was filed shortly after the District Court squarely placed at issue their property interest in the revenues the State collects from them, and which the District Court ordered be paid to the tribes.

Prior to that date, no judicial interpretation of the tribal-state compacts between the State of California and the tribes had resulted in such an order. The racing associations plainly have a direct interest in these revenues, because, absent state taxation, these monies would remain with the associations. Moreover, the associations' property interests will be significantly impaired if they are not permitted to intervene in this matter because no other forum exists where these issues can be fully addressed. In any event, after the District Court's order, the State can no longer adequately represent the racing associations' interests because the Court determined that the State had *agreed* to pay to the tribes monies that state law mandates remain with the associations.

II. The District Court erred in its interpretation of this Court's earlier decision in this matter as requiring the State to pay tax revenues collected from the racing associations to the tribes. The scope of the parties' obligations under the tribal-state compact did not become an issue

until the district court directed the tribes to file amended complaints. The legal effect of this Court's earlier opinion is limited to a declaration that the State cannot *collect* the state license fee on wagers placed at off-track facilities located on Indian lands. The parties' obligations following this declaration of law should have been fully litigated in the District Court.

III. The District Court's decision, interpreting the tribal-state compact to require the State to tax racing associations revenues and pay those monies to the tribes unconstitutionally deprives the associations of property guaranteed them under state law. This deprivation violates the due process clause of the United States Constitution, secured against state action by the Fourteenth Amendment.

IV. Although the State argues that it never agreed to a tribal-state compact which required continued taxation of the racing association and payment of the tax revenues to the tribes because the taxing statute was preempted by IGRA, at this point the State may be liable to both the tribes and the racing associations for those funds. As a result, the racing associations cannot reasonably rely on the State to adequately protect their interests.

ARGUMENT

I. DENIAL OF A MOTION TO INTERVENE AS A MATTER OF RIGHT AND IS SUBJECT TO A JUDICIALLY-FASHIONED FOUR-PART TEST WHICH IS MET BY THE RACING ASSOCIATIONS SEEKING TO INTERVENE IN THIS CASE.

A District Court's denial of a motion to intervene as a matter of right under F.R.Civ.P. 24(a)(2) is reviewed *de*

novo. United States v. Oregon, 839 F.2d 635, 637 (9th Cir. 1988); *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1990). Rule 24(a) is to be construed broadly, in favor of applicants for intervention. *United States v. Oregon*, 839 F.2d 635, 637, *supra*.

Application of F.R.Civ.P. 24(a)(2) involves a four-part test. First, the applicant's motion must be timely; second, the applicant must assert an interest relating to the property or transaction which is the subject of the action; third, the applicant must be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede its ability to protect the interest; and fourth, the applicant's interest must be inadequately represented by the parties to the action. *California v. Tahoe Regional Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1983); *Sagebrush Rebellion, Inc. v. Watt*, 713 F. 2d 525, 527 (9th Cir. 1983).

The District Court denied the racing associations' motion for lack of timeliness, stating that:

> "The motion comes very late in these proceedings and long after the proposed intervenors should have known about any interest they may have in the outcome of this litigation. Accordingly, the motion is DENIED as untimely. Fed. R.Civ.P. 24, *Engra, Inc, v. Gabel*, 958 F.2d 643, 644-45 (5th Cir. 1992)."

ER 20-21. As demonstrated herein, however, the District Court erred in denying the racing associations' motion to intervene on timeliness grounds. Not only was the motion filed shortly after the District Court construed this Court's decision and the compacts to require the State to pay the tribes revenues which were obtained

from the racing associations but the District Court's order to turn over taxes derived from race track revenues to the tribes.

Until the District Court was asked to enforce the compact by issuing an order compelling the State to release taxed racing association revenues, and until it dismissed the State's counterclaim concerning the racing associations' status as indispensable parties, no compelling reason existed to seek intervention. The State was adequately representing the interests of the racing associations who did not object to paying the state a license fee for wagers placed at Indian locations. After the District Court's order, however, the State's interests are not necessarily those of the racing associations. Intervention is therefore necessary, as well as reasonable and proper.

A. The racing associations' motion to intervene was timely made after their property interest became an issue directly affected by the District Court's order that the State pay to the tribes revenues collected from the association.

As noted earlier, the only issue before the District Court in the initial proceeding was whether the deduction of simulcast fees from the revenue generated at the tribes' facilities was an impermissible tax on the tribes. Indeed, the tribes' complaints ask only for a declaratory judgment finding that the tax is impermissible because it is imposed *on the tribes*. CR 1. The District Court rejected this contention and held that the fee was not an impermissible tax, stating:

> "State law places the duty to pay the license fee on the *racing associations*. Bus. & Prof. Code §§ 19605.7(I) & 19605.71(d). If California cannot tax the revenue derived from betting at simulcast facilities located on the Tribes' lands, these revenues would be distributed 50% to the racing associations and 50% as purses to horsemen who participate in the races. Cal. Bus. & Prof. Code §§ 10605.8 & 19606. Because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes."

Cabazon v. Wilson, 788 F. Supp. 1513, 1517, *supra*; CR 26, emphasis added.

At this point, the racing associations had no legal interest that would have justified intervention in a proceeding in which the only issue was the taxing power of the State over the tribes. This Court's decision, however, reversed the District Court and held that:

> "As the [District] Court explained, 'because the Tribes do not have the responsibility of paying the taxes, and have no right to the revenues if the taxes were to go unpaid, the license fees do not impose an economic burden on the Tribes.' *Cabazon Band*, 788 F. Supp at 1518.
>
> State law does not govern this case, however. Rather, the terms of the compact control. . . . Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the license fee that the State receives from the racing associations based on wagers at Indian facilities."

Cabazon v. Wilson, 37 F.3d 430, 433-434, *supra*.

While acknowledging that the racing associations, and not the tribes, pay the simulcast fees, this Court further concluded that the *compacts* require the State to transfer to the tribes fees paid by the racing associations, notwithstanding the associations' rights to such fees under state law. While it may have been possible for the racing associations to seek intervention at the point of this Court's decision, it is likely that such a motion would have been declared as untimely because the cause appeared to have been decided.

On remand, the case took on a second life. The District Court acknowledged in its order of July 12, 1995, that the "litigation has now entered a new and confusing stage." CR 75: 6. The District Court was referring to the fact that the State was refusing to transfer the simulcast fees to the Cabazon and Sycuan tribes on the ground, among others, that (1) this Court's determination that federal law preempted the state license fee, and its finding that the settlement provisions of the compacts established a tribal "right" to the tax revenues, imparted a meaning to the compacts that the State never intended and to which the State never agreed and (2) the Cabazon and Sycuan tribes themselves breached their compacts with the State by operating illegal slot machines. Indeed, the State challenged the very jurisdiction of the District Court to hear the tribes' claim to entitlement of the state license fee.

Although determining that it had jurisdiction, the District Court held that the tribes were required to amend their complaints if they sought an order that the State pay the tax revenues to the tribes. The original two tribes amended their complaints and the other two tribes who

act as guest facilities for off-track wagering were also permitted to intervene. The State responded to each of the complaints and asserted five affirmative defenses and three counterclaims. The State's Fifth Affirmative Defense alleged as follows:

> "As for a fifth and separate affirmative defense, Defendants aver that Plaintiff has failed to join an indispensable party, viz. the racing association participants against whose earnings the disputed license fees have been imposed by the State and title to which is claimed by Plaintiff." CR 98.

The pleading of this defense is the first time the racing associations' statutory rights to the state license fee became a triable issue in this litigation. Motions to strike all of the State's affirmative defenses were filed by the Tribes. The District Court granted the tribes' motions and struck all of the State's affirmative defenses. With respect to the defense of the failure to join the racing associations as indispensable parties, the Court stated:

> "First, there is no indication that the racing associations and horsemen have claimed any interest in this litigation, despite having had many years to do so. See *De Wit v. Firstar Corp.*, 879 F. Supp. 947, 995 (N.D. Iowa 1995) (no rule 19(a)(2) defense where absent party fails to assert interest in litigation.) Moreover the State does not explain how its interests or those of the absent parties will be prejudiced by proceeding with only those parties currently before the court." ER 14.

The State filed a motion for reconsideration but did not seek reconsideration of the District Court's ruling

striking the indispensable party defense. CR 118. Before the District Court's scheduled hearing date concerning the motion for reconsideration, the racing associations filed their motion to intervene. CR 125.

The District Court erred in holding that the racing associations could not intervene because they had been "aware" of this litigation for many years. The test for "timeliness" in an intervention motion is when the applicant becomes aware that its interest would no longer be protected adequately by the parties, not the date when the applicant first became aware of the litigation. *Legal Aid Society of Alameda v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Contrary to the District Court's statements, while this litigation may have been pending for "years," the racing associations' interest did not become a triable issue in this litigation until the District Court permitted the tribes to amend their complaints to seek affirmative relief and the State asserted and was denied its indispensable party defense.

Although the racing associations' intervention motion was not filed until July 3, 1996, the time was invested in determining how to best protect their statutory interest in the taxed revenues. This length of time was not unreasonable given the complexity and significance of the issues and the number of racing associations involved. Questions to be considered included whether the State would vigorously assert the racing associations' interest while at the same time asserting its own interest in the simulcast fees? Moreover, if intervention was granted and the tribes prevailed, what res judicata affect, if any, would such a decision have in a later action in

state Court brought by the racing associations against the State? Could the State defeat an action by the racing associations in state Court on the grounds that the tribes are indispensable parties?

Further, the motion to intervene raised no issues that were not already joined as a result of the State's indispensable party defense. Thus, no prejudice to the parties or delays in the proceedings would have resulted if the motion were granted. Under these circumstances, the motion was timely and should have been granted.

B. The racing associations have a direct interest in the simulcast fees which the District Court has ordered paid to the tribes.

The "interest" test is a "threshold" test intended to permit as many concerned persons to participate as is compatible with efficiency and due process. *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969); *County of Fresno v. National Land for People*, 622 F.2d 436, 438 (9th Cir. 1980). The racing associations' statutory right to the simulcast fees ordered to be paid the Tribes certainly is an "interest" that meets this test. The District Court was silent on this issue, relying solely on the timeliness factor in denying the motion to intervene.

As acknowledged by both the District Court in its original decision and this Court in its October, 1994 decision, if California cannot tax the revenue derived from simulcast facilities located on the tribes' lands, these revenues would be distributed under state law in equal shares to the racing associations and as purse monies for the horsemen who participate in the races. California

Business and Professions Code sections 10605.8 and 19606. The deprivation of that right due to judicial construction of the compacts implicates due process rights which should be heard in this case.

C. The racing associations' interest in the simulcast fees will be significantly impaired if they are not allowed to intervene in this action.

The test for whether there is an "impairment" of a proposed intervenor's interest is whether the disposition of the underlying action may practically impair or impede the applicant's ability to protect its interest. *Scott's Valley Band of Pomo Indians* v. *United States*, 921 F.2d at 927, *supra*; *Federal Deposit Insurance Corporation v. Engle*, 524 F.2d 1339, 1340 (9th Cir. 1975).

If the State is required to use its taxing authority to transfer to the tribes revenues collected from the racing associations, the associations will have no means of challenging the tribes' right to these fees other than by an action against the State and the tribes. The tribes are immune from suit by the racing associations. Therefore, the only means by which the racing associations' interest may be resolved with respect to both the State and the tribes is in a proceeding in which both the tribes and the State are parties – the instant proceeding.

If the racing associations are limited to an action against the State in state Court, a judgment in their favor will still require that an appropriation be made to pay the judgment. The fate of such legislation will depend upon whether the Legislature, who must enact the legislation, and the Governor, who has item veto power over the

legislation, agree that the State should pay. *Calif. State Employees Assn. v. Flournoy*, 32 Cal.App.3d 219 (1973). Given the fact that a state Court action would be initiated only if the tribes had already been paid the license fee collected from the racing associations, it is most likely problematic whether the legislature or the Governor would be amenable to reimbursing the associations for funds which were previously paid to the tribes. Unlike federal Courts, the California state Courts cannot authorize a levy on the State's bank accounts to honor money judgments. (*Id.*, at 234-235.)

D. The State has interests which may conflict with the interests of the racing associations and preclude the State from adequately representing the associations in this litigation.

The test for whether a proposed intervenor is "adequately" represented is whether (1) the interest of the present parties to the suit are such that they will undoubtedly make all of the intervenors' arguments; (2) the present parties are willing and capable of making such arguments; and (3) the intervenors would not offer any necessary element to the proceeding that the other parties would neglect. *County of Fresno* v. *National Land for People*, 622 F. 2d at 436, *supra*; *Blake v. Pallan*, 554 F.2d. 947, 954 (9th Cir. 1977).

Although the State raised the racing associations' statutory rights by way of an affirmative defense, that is not the same as the State actively supporting the associations' claim. As noted earlier, if the racing associations' rights are not addressed in this proceeding, they will

have to be addressed in a state proceeding in which the State is the only party. If the racing associations prevail, the State will be liable for monies it has paid the Tribes. Given this potential liability, it cannot be assumed that in the absence of the racing associations, the State will vigorously advance arguments in this proceeding that might benefit the associations in a separate state proceeding.

Secondly, the State has other compact issues to resolve with the tribes, not the least of which is the current operation of slot machines on the tribes' lands. Those negotiations may well involve trade-offs in which the interests asserted by the racing associations are subordinated to the resolution of issues more important to the State. If successful, these negotiations could lead the State to abandon the associations' interest during the appeal.

Thus, the District Court erred in refusing to permit the racing associations' intervention in this matter in order to advance and defend their interest in the license fees collected from them. This Court should grant the motion to intervene.

II. THE DISTRICT COURT INCORRECTLY INTERPRETED THIS COURT'S OCTOBER, 1994 DECISION AS *REQUIRING* THE STATE TO PAY TAX REVENUES COLLECTED FROM THE RACING ASSOCIATIONS TO THE TRIBES.

Although the racing associations have not yet been granted intervention status, a successful appeal to this Court which remanded the merits of their case to the District Court would unnecessarily delay these proceedings. If the motion to intervene is granted by this Court,

the racing associations urge this Court to consider the following legal arguments.

The District Court's grant of summary judgment to the tribes is reviewed de novo by an appellate Court. *Heiniger v. City of Phoenix*, 625 F.2d. 842, 843-44 (9th Cir. 1980). The reviewing Court must determine whether there are any genuine issues of material fact and that it is entitled to judgment as a matter of law. (cite) Fed. Rules Civ. Proc. 56(c). *Amaro v. Continential Can Company*, 724 F.2d. 747, 749 (9th Cir. 1984). On appeal, the reviewing Court must view the evidence in the light most favorable to the opposing party and determine if the trial Court correctly applied the law. *Kropp v. Ziebarth*, 601 F.2d. 1348, 1352 (8th Cir. 1979). The racing associations contend that the District Court misinterpreted this Court's earlier holding in this case and refused to hear relevant evidence concerning the nature of the tribal-state compact negotiated between the State and the tribes.

In its April, 1996 opinion, the District Court interpreted this Court's earlier decision to hold that "the [state license] fee could not be collected in part because the State had agreed to pay over the fee to the tribes if the State lost the litigation." ER 2. From this holding, it is evident that the District Court took this Court's October, 1994 opinion to mean that the state license fee is invalid and cannot be retained by the State because, unless the tribes prevail in the litigation, they will not be entitled to the tax revenue refund provided for in the tribal-state compact. The racing associations contend that this Court did not so find, in part because such a construction defies logic. Rather, this Court's earlier opinion should be read to hold that the federal interest expressed in IGRA, viz.,

that the tribes be the primary beneficiaries of gambling on their lands, precludes the imposition of the state tax on the racing associations. Accordingly, if the state tax is never imposed, the tribes will again be the "primary beneficiary", at least by comparison with the State.

The District Court appears to understand this Court's opinion as follows: the tribes must prevail in this litigation so that they will be paid the state license fee, thereby making them the primary beneficiaries of off-track wagering on their lands. Of course, the question of *whether* the tribes prevail in the litigation cannot be decided by resort to a previously-agreed compact provision distributing the state license fee depending on the *outcome* of the litigation, and the racing associations contend that this is not the holding of this Court's earlier opinion. A brief review and summary of the earlier opinion demonstrates this point.

First, this Court expressly rejected the tribes' claim that, by its terms, section 2710(d)(4) of IGRA precludes any taxation of either the tribes or entities authorized by the tribes to engage in Class III gambling. Rather, the earlier opinion notes that section 2710(d)(4) merely *does not authorize* taxation. The fact that IGRA does not authorize taxation does not equate to a statutory prohibition of taxation. *Cabazon v. Wilson*, 37 F.3d 430, 432-433, *supra*.

Second, this Court balanced the interests of the federal government and the tribes with those of the State to determine if the state taxing statute was preempted because it interfered or was incompatible with federal and tribal interests "reflected in federal law." *Id.*, at 433. The federal interest was identified in IGRA's section

2701(2) as "ensuring that the Indian tribe is the primary beneficiary of the gaming operation." *Ibid.* The opinion noted that since the State's license fee amounts to a greater sum than the percentage commission the tribe is paid for becoming a race track "guest facility," the State's collection of the license fee prevents the tribe from being the primary beneficiary. *Ibid.*

The tribal interest identified by this Court would not exist were it not for those paragraphs of the compacts which provide for the distribution of the state license fee depending on the outcome of this litigation. See, e.g., CR 19: Exhibit 1, ¶ 19 [Cabazon compact]. This Court acknowledged the District Court's initial holding that the racing associations actually pay the state license fee to the State and would therefore be entitled under state law to retain those funds if the tax was not paid. *Id.*, at p. 434.

The opinion refused to apply state law, however, and found that the tribes had a right to the fees in the "settlement provisions" of the compact distributing the tax revenues after conclusion of the litigation. Thus this portion of the opinion did not consider whether the State could be ordered to pay tax revenues collected from the racing associations to the tribes, but rather determined that the state tax "could not be collected" because to do so would preclude the tribes from being the primary beneficiaries of the off-track wagering occurring on their lands.

The racing associations understand the State to contend that if the holding of this Court denies the State the benefit of the state license fee *for the reason* that, unless the fee is paid to the tribes they will not be the primary

beneficiaries of the off-track wagering compact, the compact's validity is then at issue. The State argues that the compact provides only that the tribes are entitled to the fee if it is judicially determined that the fee was derived from tribal assets or in some way diminishes tribal assets such as was the case in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980). The State thus contends that it never agreed to collect the tax for the benefit of the tribes, but rather only to *refund* the fee if it was determined that the *fee* was being imposed directly on the tribes or was shown to diminish their assets.

This Court did not determine that the state license *fee* burdened tribal assets (nor could it because the only tribal asset from off-track wagering is the 2% commission the tribe is paid for becoming a race track guest facility, and that commission is untaxed and unaffected by the state license fee.) Rather, this Court held that paragraph 19(b) of the *compact* (the "settlement provisions") burdened the tribes' interests because it provided a mechanism which, if invoked, established the tribes as the "primary beneficiary" of off-track wagering at their facilities. Even if the compact's settlement provisions are necessary to comply with IGRA, however, they do violence to California's Horse Racing Law, which sets forth and regulates the *state-regulated* scheme of horse racing in which the tribes seek to participate. Thus, the State argues that such a construction of the compacts was never agreed to by the State and that the State should be permitted to present evidence in support of this contention. If proven, the State's lack of agreement would nullify the compact.

More importantly to the racing associations, utilized in the fashion specified by the District Court, those compact terms also do violence to the statutorily-granted property interests of the racing associations, which are constitutionally protected. The issue of the compacts' remaining vitality remains to be resolved by this Court. Although the racing associations do not object to the State continuing to collect its tax from the racing associations' proceeds derived from off-track wagering, they do object to the State, in effect, using its taxing authority to distribute to the tribes monies collected from the racing associations under State law. If this is the result of the compacts negotiated by the State, the racing associations contend that they were unconstitutionally deprived of the revenue they generated by conducting horse racing meets and broadcasting the audiovisual signal of those meets to guest facilities which the State permitted to be established on Indian lands.

III. A DECISION REQUIRING THE STATE TO TAX PRIVATE RACING ASSOCIATION REVENUES AND PAY THOSE MONIES TO THE TRIBES VIOLATES BOTH THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS OF THOSE ASSOCIATIONS.

This Court's conclusion that the tribal-state compacts supersede state law (even though state law was incorporated into the compacts [see paragraph 16 of each of the compacts]) also raises important legal questions. This Court cited no case or statutory authority for this proposition, but relied on the Senate Report accompanying IGRA which expressed congressional intent that state law

would not generally apply to Indian lands unless the tribe consented to its application. *Cabazon v. Wilson*, 37 F.3d 430, 434 and S. Rep. No. 446, 100th Cong. 2d Sess., pp. 5-6. In any event, this is a different question than whether state law should be considered, in this case, for the purpose of determining the parties' intent with respect to the "settlement provisions" of the compacts, which provide for a refund to the tribes of the state license fee under certain specified circumstances with respect to this litigation. The District Court's refusal to permit the State to demonstrate that the State's ability to agree to the compact's settlement provisions *depended on compliance with state law* has resulted in a decision which would force the State to collect tax revenues from the racing associations for the benefit of the tribes. Both state and federal constitutional law forbid such a result.

Although the compacts may have the force of a federal statute – in the limited sense that the appropriate scope of gambling on Indian lands is defined by IGRA as only that gambling activity which is permitted under state law and regulated by a tribal-state compact – such compacts cannot *create* state law, nor can they supersede constitutional rights.

Interstate Compacts between States, which are expressly authorized by the United States Constitution, and which must be approved by Congress, do supersede state statutory and constitutional provisions. U.S. Constitution; Art. I, sec. 10, cl. 3. However even interstate Compacts do not supersede the federal constitution. This proposition was made abundantly clear in a series of cases involving regulatory "taking" issues arising from the planning decisions of the Tahoe Regional Planning

Agency created by the Tahoe Regional Planning Compact between California and Nevada. See *Jacobson v. TRPA*, 566 F.2d 1353, 1358 (9th Cir. 1977); *Stephan v. TRPA*, 697 F.Supp. 1149 (D.Nev. 1988); *Tahoe Sierra Preservation Council v. TRPA*, 938 F.2d 153 (9th Cir. 1991); and *Tahoe Sierra Preservation Council v. TRPA*, 34 F.3d 753 (9th Cir. 1994.).

The tribal-state compacts before this Court do not rise to the level of interstate Compacts approved by Congress. The only extent to which the State Constitution or laws are superseded by a compact executed pursuant to IGRA is to the extent that such provisions conflict with the implementation of IGRA. IGRA does not create a right in the tribes to the property of third parties, and even if it did, it would be unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. The State simply cannot confer on the tribes, even under the compulsion of IGRA or a tribal-state compact, such a right.[8]

Moreover, such action by the State in depriving the racing associations of their property rights is violative of the State constitution. Article 1, section 7 of the California Constitution provides, in pertinent part, as follows:

> "A person may not be deprived of life, liberty or property without due process of law. . . . "

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[8] The racing associations recognize that the State does not intentionally propose to deprive them of their property rights. Nonetheless, it is important to analyze the power of the State to do so, even if the State is reluctantly complying with federal law or with provisions of a tribal-state compact which have been interpreted by a federal Court in a manner not originally intended by the State.

Nothing in IGRA permits the Governor and the CHRB the power to execute a tribal-state compact which deprived proposed intervenors of rights guaranteed under the State Constitution. See, *Pueblo of Santa Ana v. Kelly*, 932 F.Supp. 1284 (1996); App. pndg (10th Cir.) [compact signed by the Governor without authority under state law is null and void].

The racing associations have no other means of defeating the tribes' claims against their property interest except through intervention as defendants in this action. Unlike the State, the racing associations have no authority to bring an independent action to challenge the terms of the compact. Such an action would undoubtedly require that the Tribes be named; their response would also undoubtedly be to raise their immunity from suit.

Nor could the racing associations bring an independent action against the State challenging the compact, because such an action would require that the Tribes be named. Thus, there is no other avenue of relief for the racing associations other than to intervene in this action to raise their constitutional claims in opposition to the District Court's interpretation of the compact provisions.

IV. AT THIS POINT IN THE LITIGATION, THE INTERESTS OF THE RACING ASSOCIATIONS CANNOT BE ADEQUATELY PROTECTED BY THE STATE.

The basis of the racing associations' motion in the District Court was that the construction of the compacts urged by the Tribes and adopted by that Court amounts to an unconstitutional taking of their property. Given the

substantial nature of the racing associations' claims, they plainly should be allowed to assert their interests in this litigation.

Obviously, the State does not believe its actions in negotiating compacts with the tribes were unconstitutional. The State has repeatedly asserted that it disagrees with the import of the compacts' terms as determined by this Court and of the construction of the compact given by the District Court. However, with all due respect to the State and the State's intentions – with which the racing associations have no quarrel – as a practical matter, the issue of a constitutional taking can more effectively be advanced by the owner of the property interest taken than by the party who may have inadvertently caused the taking.

For these additional reasons, the racing associations urge this Court to grant their motion to intervene.

V. THE ISSUE RAISED BY THE RACING ASSOCIATIONS IS SOLELY ONE OF LAW.

Nothing in the provisions of IGRA purports to suggest that the Governor and the California Horse Racing Board on the one hand, and the tribes and the Secretary of the Interior on the other, have the power to enter into a consensual arrangement transferring property belonging to a non-tribal entity to the tribes. The ramifications of such an interpretation are manyfold and very disturbing.

For example, under the District Court's decision, nothing would legally prevent the State and the tribes from amending their compacts to increase the tribes'

statutory share of satellite wagering revenues by transferring to the tribes the exclusive right to retain all revenues in the parimutuel pool. Indeed, although the tribes are currently only seeking to appropriate to themselves the license fee paid to the State by the racing associations, nothing prevents them from later seeking to retain the distributions required by the Horse Racing Law to such entities as the University of California's equine research institutes or the distribution to SCOTWINC which pays for the entire operation of satellite wagering in California. Cal. Bus. and Prof. Code secs. 19605.7 and 19605.71.

Although the racing associations' claim arises under the Fifth and Fourteenth Amendments, the claims are solely issues of law which can be presented without unduly delaying disposition of this case. Their importance mandates, however, that this Court consider them before rendering judgment in this matter. Having considered these claims, the racing associations urge this Court to reject the District Court's construction of the compacts mandating the forced taxation of the funds which the associations derive from off-track wagering and providing the tribes the unearned and gratuitous windfall which they would receive.

CONCLUSION

For each of the foregoing reasons, appellant racing associations, the proposed intervenor defendants, urge this Court to reverse the District Court and grant their motion to intervene. Moreover, appellant racing associations request that the order of the District Court requiring the State of California to use its taxing authority to obtain

revenues belonging to the associations under State law and paying those monies to the tribes be reversed.

DATED: November 27, 1996

Respectfully Submitted,

NIELSEN, MERKSAMER, PARRINELLO, MUELLER & NAYLOR

By: /s/ Cathy Christian
CATHY CHRISTIAN
Attorneys for Proposed Defendant Intervenors/ Appellants

Addendum – Relevant Statutes

19480. The board may issue to any person who makes application therefor in writing, who has complied with the provisions of this chapter, and who makes the deposit to secure payment of the license fee imposed by this article, a license to conduct a horseracing meeting in accordance with this chapter at the track specified in the application; provided, the board determines that the issuance thereof will be in the public interest and will subserve the purposes of this chapter.

19481. In performing its responsibilities, the board shall do all of the following:

(a) Establish safety standards governing the uniformity and content of the track base and racing surface, inner and outer rails, gates and gaps, turf, access and egress to the track, lighting for night racing, equipment for horse and rider, drainage, communication, veterinary service, medical and ambulance service, and other track

facilities in order to improve the safety of horses, riders, and workers in the racing inclosure.

(b) Designate a steward at all horseracing meetings to be responsible for maintaining safety standards.

19481.5. Notwithstanding any other provision of law, no license shall be issued to conduct a horserace meeting upon a track unless the track has been inspected by the board within 30 days prior to the date of application for a license and the track has been approved by the board as conforming to the racetrack safety standards set forth in subdivision (a) of Section 19481.

This section shall become operative on January 1, 1995.

19482. No license to conduct a horseracing meeting shall be issued to any of the following:

(a) Any nonprofit corporation entitled to an exemption from any tax imposed by this State.

(b) Any applicant who proposes to conduct a horseracing meeting for the benefit of any such nonprofit corporation or under any arrangement pursuant to which such nonprofit corporation is to share in the receipts of the licensee from the conduct of such meeting, whether by rentals or otherwise.

Nothing in this section prohibits the board, in its discretion, from issuing a license to conduct a horseracing meeting to any corporation to which it has, prior to September 7, 1955, issued a license to conduct such a meeting.

19483. Unless the board finds that the purpose of this chapter will be better served thereby, no license to conduct a horseracing meeting at any track shall be issued to any person or held by any person having any financial interest in the conduct of any horseracing meeting by any other person at any other track in this State.

Ownership of stock in one corporation by another corporation constitutes a financial interest within the meaning of this section.

19484. Unless the board finds that the purpose of this chapter will be better served thereby, no person licensed under this article to conduct a horseracing meeting at any place, track or inclosure shall own or acquire any stock or hold or obtain any other financial interest in any other track of another such licensee or in the operation thereof, or in the operation of authorized wagering on the results of horseraces at any such other track.

19485. The board shall not issue a license to conduct a horseracing meeting at any place, track or inclosure, not used for horseracing meetings prior to July 1, 1941, unless prior to the beginning of the construction or preparation of such track for horseracing meetings, the board, upon application in such form as it may require, has determined that the conduct of horseracing meetings at such track will be in the public interest and will subserve the purposes of this chapter.

This section does not apply in respect to any track of not less than five-eighths of one mile in circumference or length partially or entirely in the infield of a mile track constructed and operated by a Thoroughbred licensee

under this article provided that such infield track is to be used solely for Thoroughbred racing.

19485.5 In any city with a population in excess of 2,750,000, no horseracing track shall be established in any flood control basin situated totally within the city on property which contains more than 1,800 acres, and which is owned by the federal government until the city council has called a special election on whether the people in the surrounding area approve of the establishment of a new race track. Such special election shall be conducted in those voting precincts any part of which is situated in the area of the city within three miles of the boundary of the property on which the race track is to be established. Two-thirds of the registered voters who participate in the election and cast ballots shall approve of the establishment of such a horseracing track before the board may issue a license to conduct horseracing at the track.

19487. Notwithstanding Section 19486, any licensed racing association operating a racetrack may construct another track of not less than one-half mile in circumference or length partially or entirely in the infield of such track, if prior to the beginning of construction or preparation of such track for horserace meetings, the board has determined upon application, in such form as it may require, that the conduct of horseracing meetings at such track will be in the public interest and subserve the purposes of this chapter. A license may be granted to any harness racing association to conduct a harness racing meeting upon such a track of less than one mile.

19488. (a) Every license issued under this article shall specify the following:

(1) The name of the person to whom it is issued.

(2) The track where the horseracing meeting to which it relates is to be held or conducted.

(3) The days and hours of the day when the meeting will be permitted.

(4) The number and types of races to be run on each day of the meeting.

(5) The number of useable stalls available for the meeting.

(6) The name of the person responsible for supervising the maintenance of racetrack safety standards. This paragraph shall become operative on January 1, 1993.

(b) The license shall also recite the payment to, and receipt by, the board of the deposit to secure payment of the license fee required by this article.

19489. A license issued under this article is not transferable nor does it permit the conduct of a horseracing meeting at any track not specified therein.

If, however, the track specified in a license becomes unsuitable for racing because of fire, flood, or other catastrophe, the meeting or any remaining portion thereof may be conducted at any other track specified by the board in the same area. The board may specify any other track within the area for the conduct of the meeting, whether or not such conduct would result in increasing the number of racing days in the county or area in which

such track is situated. Before any other track is so specified, the board shall obtain the consents of the person licensed to conduct a meeting at the track which has become unsuitable for racing and of the owners and operators licensed to conduct a meeting at such other track.

19530. The board shall have the authority to allocate racing weeks to an applicant or applicants pursuant to the provisions of this article and Article 6.5 (commencing with Section 19540) and to specify such racing days, dates, and hours for horseracing meetings as will be in the public interest, and will subserve the purposes of this chapter. The decision of the board as to such racing days, dates, and hours shall be subject to change, limitation or restriction only by the board. No municipality or county shall adopt or enforce any ordinance or regulation which has or may have the effect of directly or indirectly regulating, limiting or restricting the racing days and dates of horseracing meetings.

19530.5. For the purposes of this article there shall be three geographical zones which shall be designated (a) the "southern zone," which shall consist of the Counties of Imperial, Orange, Riverside, and San Diego; (b) the "central zone," which shall consist of the Counties of Kern, Los Angeles, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura; and (c) the "northern zone," which shall consist of the remaining counties in the state.

19531. The board shall make allocations of racing weeks, including simultaneous racing between zones, as it deems appropriate. The maximum number of racing weeks that may be allocated for horseracing other than at

the California Exposition and State Fair, or county or district agricultural association fairs, shall be as follows:

(a) For thoroughbred racing: 44 weeks per year in the northern zone; 42 weeks per year in the central zone; and seven weeks per year in the southern zone.

(b) For harness racing: 25 weeks per year in the northern zone.

(c) For quarter horse racing: 25 weeks per year in the northern zone.

(d) For harness racing and quarter horse racing: a total of 77 weeks per year in the combined central and southern zones.

(e) In its written application for a license, an applicant shall state the time of day, consistent with Section 19571, during which it will conduct its racing meeting, and particularly the first race starting time for the various racing days. After receiving a license, a licensee shall not change the first race starting time without securing prior approval of the board.

(f) Notwithstanding this section or any other provision in this chapter, the board shall not allocate dates to a thoroughbred association in the central zone for the purpose of conducting racing during daytime hours if a thoroughbred racing association is conducting racing in the southern zone on the same date during daytime hours.

(g) An association licensed to conduct a racing meeting in the southern zone may operate a satellite wagering facility at a location approved by the board pursuant to Section 19485 if the location is eligible to be

used as a satellite wagering facility during any of the following periods:

(1) The first and second year in which the board allocates racing weeks to the location.

(2) The third year in which the board allocates racing weeks to the location only if at least 12 weeks of racing are allocated to the location during that year.

(3) The fourth year and any subsequent year in which the board allocates racing weeks to the location only if at least 12 weeks of racing are allocated to the location during each year, and only if the association actually conducted at least 12 weeks of racing at the location during the prior year, unless the failure to race these 12 weeks during any year is caused by a decision of the board to prohibit the overlap of night racing or a decision of the board to issue a competing application to another facility.

19532. (a) Any association licensed to conduct thoroughbred racing in the northern zone may receive no more than 22 weeks of that racing.

(b) Any association licensed to conduct thoroughbred racing in the central zone may receive no more than 17 weeks of that racing, except that any association which conducts a split meeting may receive up to 20 weeks of that racing. No more than one such split meeting may be licensed in any one year.

(c) This section and Section 19531 shall not operate to deprive any association of any weeks of racing granted during 1980.

(d) This section and Section 19531 shall not operate to deprive the California State Fair and Exposition of any weeks of racing granted during the previous calendar year, and the board may continue to allocate those weeks of racing to the California Exposition and State Fair or any lessee thereof.

(e) Nothing in subdivision (d) is a limitation on the board allocating racing weeks to any private racing association as a lessee of the California Exposition and State Fair racetrack facility pursuant to Sections 19531 and 19532.

19533. (a) Any license granted to an association other than a fair shall be only for one type of racing, thoroughbred, harness, or quarter horse racing as the case may be, except that the board may authorize the entering of thoroughbred and Appaloosa horses in quarter horse races at a distance not exceeding five furlongs at quarter horse meetings, mixed breed meetings, and fair meetings. If the board authorizes the entering of thoroughbred or Appaloosa horses in quarter horse races, the following conditions shall be met:

(1) Any race written for participation by quarter horses, Appaloosas, and thoroughbred shall be written as quarter horse preferred.

(2) The number of races written as quarter horse preferred at a distance exceeding 870 yards shall not exceed more than three races per program without the consent of the quarter horse horsemen's organization contracting with the association.

(3) More than one-half of the races on any program shall be written for quarter horses at a distance not to exceed 550 yards, unless the consent of the quarter horse horsemen's organization is received.

(4) Mixed races with Appaloosa and quarter horses may only be written with the consent of the quarter horse horsemen's organization contracting with the association.

(b) The association that conducts the meeting shall pay to the horsemen's organization representing thoroughbred horsemen an amount for a pension plan for backstretch personnel to be administered by that horsemen's organization equivalent to 1 percent of the amount available to thoroughbred horses for purses. The remainder of the portion shall be distributed as purses. Any redistributable money paid to the board pursuant to Section 19641, which is paid to a welfare fund established by a horsemen's organization from races with both thoroughbred and quarter horses, shall be divided pro rata between the two welfare funds based on the number of thoroughbred and quarter horses in the race.

(c) (1) Notwithstanding any other provision of law, any association licensed to conduct quarter horse racing may apply to the board for, and the board shall grant, authority to conduct thoroughbred racing as part of its racing program if all of the following conditions are met:

(A) The thoroughbred races are for a claiming price of not more than five thousand dollars ($5,000), and at a distance of four and one-half furlongs or less. The races may not be stakes, allowance races, or maiden allowance races.

(B) More than one-half of the races on any program shall be for quarter horses at a distance not to exceed 550 yards, unless the consent of the quarter horse horsemen's organization is received.

(C) The consent of the quarter horse horsemen's organization contracting with the association is obtained with respect to the inclusion of thoroughbred racing.

(2) The quarter horse racing association conducting thoroughbred racing pursuant to this subdivision shall pay to a quarter horse horsemen's organization the amount specified in subdivision (e) of section 19613, and to the horsemen's organization representing thoroughbred horsemen an amount for a pension plan for backstretch personnel to be administered by that horsemen's organization equivalent to 1 percent of the amount available to thoroughbred horses for purses. The remainder of the portion shall be distributed as purses. The quarter horse racing association shall also deduct the appropriate amount to comply with subdivision (a) of Section 19617.2 for distribution to the thoroughbred official registering agency.

(d) This section shall remain in effect only until January 1, 1995, and on that date is repealed, unless a later enacted statute, which is enacted before January 1, 1995, deletes or extends that date.

19533. (a) Any license granted to an association other than a fair shall be only for one type of racing, thoroughbred, harness, or quarter horse racing as the case may be, except that the board may authorize the entering of thoroughbred and Appaloosa horses in quarter horse races at a distance not exceeding five furlongs at

quarter horse meetings, mixed breed meetings, and fair meetings. If the board authorizes the entering of thoroughbred or Appaloosa horses in quarter horse races, the following conditions shall be met:

(1) Any race written for participation by quarter horses, Appaloosas, and thoroughbreds shall be written as quarter horse preferred.

(2) The number of races written as quarter horse preferred at a distance exceeding 870 yards shall not exceed more than three races per program without the consent of the quarter horse horsemen's organization contracting with the association.

(3) More than one-half of the races on any program shall be for quarter horses at a distance not to exceed 550 yards, unless the consent of the quarter horse horsemen's organization is received.

(4) Mixed races with Appaloosa and quarter horses may only be written with the consent of the quarter horse horsemen's organization contracting with the association.

(b) The association that conducts the meeting shall pay to a thoroughbred trainers' organization an amount for a pension plan for backstretch personnel to be administered by that trainers' organization equivalent to 1 percent of the amount available to thoroughbred horses for purses. The remainder of the portion shall be distributed as purses. Any redistributable money paid to the board pursuant to Section 19641, which is paid to a welfare fund established by a horsemen's organization from races with both thoroughbred and quarter horses, shall be divided

pro rata between the two welfare funds based on the number of thoroughbreds and quarter horses in the race.

(c) (1) Notwithstanding any other provision of law, any association licensed to conduct quarter horse racing may apply to the board for, and the board shall grant, authority to conduct thoroughbred racing as part of its racing program if all of the following conditions are met:

(A) The thoroughbred races are for a claiming a price of not more than five thousand dollars ($5,000), and at a distance of four and one-half furlongs or less. The races may not be stakes, allowance races, or maiden allowance races.

(B) More than one-half of the races on any program shall be for quarter horses at a distance not to exceed 550 yards, unless the consent of the quarter horse horsemen's organization is received.

(C) The consent of the quarter horse horsemen's organization contracting with the association is obtained with respect to the inclusion of thoroughbred racing.

(2) The quarter horse racing association conducting thoroughbred racing pursuant to this subdivision shall pay to a quarter horse horsemen's organization the amount specified in subdivision (e) of Section 19613, and an amount for a pension plan for backstretch personnel to be administered by a thoroughbred trainers' organization equivalent to 1 percent of the amount available to thoroughbred horses for purses. The remainder of the portion shall be distributed as purses. The quarter horse racing association shall also deduct the appropriate amount to

comply with subdivision (a) of Section 19617.2 for distribution to the thoroughbred official registering agency.

(d) This section shall become operative on January 1, 1995.

19533.5. Notwithstanding Section 19533, the board may authorize the following mixed breed racing:

(a) An association licensed to conduct a quarter horse meeting to include Appaloosa races and Arabian races with the consent of the quarter horse horsemen's organization contracting with the association with respect to the conduct of the racing meeting.

(b) A race between a quarter horse and a thoroughbred horse at a thoroughbred meeting with the consent of the thoroughbred horsemen's organization contracting with the association with respect to the conduct of the racing meeting.

19534. (a) Notwithstanding Section 19531 or 19532, the board may allocate up to 100 days of racing to an association licensed to conduct racing for the purpose of conducting an Appaloosa invitational meeting. An Appaloosa invitational meeting may only be held at a racing facility leased from the California Exposition and State Fair, a district Agricultural association, or a county fair.

(b) Notwithstanding Section 19414.5, a racing meeting conducted pursuant to this section shall consist of racing weeks of not less than four days.

19535. (a) Notwithstanding any other provision of law, at the time the board allocates racing weeks, it shall

determine the number of usable stalls that each association or fair shall make available and maintain in order to conduct the racing meeting. The minimum number of stalls may be at the site of the racing meeting or at board-approved offsite locations.

(b) With respect to racing meetings conducted in the northern zone, the association or fair conducting the meeting shall provide all stabling required by the board pursuant to subdivision (a) without cost to participating horsemen. Offsite stabling shall be at a board approved facility or facilities selected by the association or fair with the agreement of the organization representing horsemen participating at the meeting. If there is a disagreement between the association or fair and the organization representing the majority of horsemen participating at the meeting with respect to the selection of offsite stabling facilities, the board, at the request of the association or fair or the organization representing the majority of horsemen participating at the meeting, shall promptly determine the board-approved facility or facilities at which offsite stabling shall be made available. The organization representing horsemen participating at the meeting and the association or fair shall mutually agree on the criteria and selection of horses that may use stalls required pursuant to this section. With respect to northern zone thoroughbred meetings only, the association shall also provide, at the option of the horse owner, vanning of participating racehorses from any board-approved offsite stabling facility in the northern zone. Fairs may provide, subject to the availability of funds pursuant to subdivisions (e) and (g) of Section 19605.7, at the option of the horse owner, vanning of participating

racehorses from any board-approved offsite stabling facility.

(c) With respect to racing meetings conducted in the central or southern zones, all costs associated with the maintenance of the usable stalls for the racing meeting shall be borne by the association or fair conducting the meeting, and, with respect to useable stalls at an offsite location, the association or fair may be required, by order of the board, to bear the costs of vanning from the offsite location to the racing meeting. However, with respect to any racing association in the central or southern zone that conducted a racing meeting in 1986, if the number of usable stalls made available onsite by a racing association during a racing meeting is less than 95 percent of the number of usable stalls made available onsite by that racing association during its 1986 racing meeting, the racing association shall reimburse the facility providing offsite stabling for the difference in cost between the actual number of usable stalls made available and 95 percent of the usable stalls made available in 1986.

The racing association shall, in addition, reimburse the owner for vanning to the onsite location with respect to those horses stabled at an offsite location necessitated by the failure of a racing association to maintain 95 percent of the usable stalls made available by that racing association during its 1986 racing meeting.

19605.7.

(i) Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section.

19605.71.

(d) Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section.

19605.8. (a) For thoroughbred meetings, the funds remaining after distribution of the amounts set forth in Sections 19605.7 and 19605.71 shall be distributed 50 percent as commissions to the association that conducts the racing meeting and 50 percent as purses to the horsemen participating in the racing meeting.

(b) Notwithstanding subdivision (a), 50 percent of the amount deducted pursuant to Section 19610.2 from the satellite wagering handle shall be paid to the board for deposit in the General Fund, and 50 percent shall be distributed as purses to the horsemen participating in the racing meeting, notwithstanding the distribution specified in Section 19610.2.

19606. (a) For harness, quarter horse, Appaloosa, Arabian, mixed breed, and fair meetings, the funds remaining after the distribution of the amounts set forth in Sections 19605.7 and 19605.71 shall be distributed 50 percent as commissions to the association that conducts the racing meeting and 50 percent to the horsemen participating in the racing meeting in the form of purses. However, owners' premiums shall be paid from the amount distributed for purses in the same relative percentage as owners' premiums are paid at the racing meeting.

(b) Notwithstanding subdivision (a), 50 percent of the amount deducted pursuant to Section 19610.2 from the satellite wagering handle shall be paid to the board

for deposit in the General Fund, and 50 percent shall be distributed as purses to the horsemen participating in the racing meeting notwithstanding the distribution specified in Section 19610.2.

19608.2. (a) In order to permit associations providing audiovisual signals the ability to do so without undue burden and expense, to avoid unnecessary duplication of facilities, to permit the associations to protect the security of their signals, and to permit the associations to protect the integrity of their parimutuel pools and to account for wagering proceeds

(d) Any organization formed shall provide horsemen's organizations contracting with associations and fairs for racing meetings and nonracing fairs operating satellite wagering facilities meaningful representation on its governing board, and shall administer the audiovisual signal and parimutuel operations at satellite wagering facilities.

CERTIFICATE OF COMPLIANCE

The accompanying opening brief of appellants and proposed intervenor-defendant racing associations was prepared using a proportionately spaced typeface (Times Roman) and was created with 14-point type. The brief is double-spaced and contains 8329 words.

DATED: November 27, 1996

Respectfully Submitted,
Nielsen, Merksamer, Parrinello,
Mueller & Naylor

By: /s/ Cathy Christian
CATHY CHRISTIAN
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Defendant Intervenors/
Appellants

STATEMENT OF RELATED CASES

Counsel for proposed defendant intervenor racing associations are unaware of any cases pending in this Court related to this case.

DATED: November 27, 1996

Respectfully Submitted,
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By: /s/ Cathy Christian
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PROOF OF SERVICE BY MAIL
(Code Civ. Proc. §§ 1013a, 2015.5)

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 770 L Street, Suite 800, Sacramento, California 95814.

On November 27, 1996, I served the foregoing **BRIEF** on the parties in said action by enclosing a true copy thereof in an envelope and placing the envelope for collection and mailing on the date and at the place set forth

above following our ordinary business practices, addressed as follows:

PLEASE SEE ATTACHED LIST

I am readily familiar with this firm's practice for collecting and processing envelopes for mailing. On the same day that envelopes are placed for collection and mailing, they are deposited in ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 27, 1996, at Sacramento, California.

/s/
CHERYL BALDI

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Supreme Court, U.S.
FILED
'97 1636 APR 6 1998
OFFICE OF THE CLERK

No. 97-___

In The

Supreme Court of the United States

October Term, 1997

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CABAZON AND SYCUAN BANDS OF MISSION INDIANS, Plaintiffs-Appellees, and **BARONA AND VIEJAS BANDS OF MISSION INDIANS,** Plaintiffs-Intervenors-Appellees, vs. **PETE WILSON,** Governor of the State of California; **STATE OF CALIFORNIA;** and **CALIFORNIA HORSE RACING BOARD,** Defendants-Appellants.	No. 96-16432
SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., ET AL., Proposed Intervenors-Appellants.	

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INTRODUCTORY STATEMENT

Nature of the Controversy

Although this case may have originated as a dispute about jurisdiction, and no matter how the State[1] may attempt to characterize it otherwise, at this point this appeal is about nothing more than money. More precisely, this appeal is about whether the State will be able to hold on to a large fund of money that has accumulated while the State and four federally-recognized Indian tribes[2] have litigated their respective entitlements to that fund. Despite the State's desperate attempt to shift the focus, the essential nature of this case at this point is the disposition of this fund, to which this Court has already held the Tribes are entitled.

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[1] As used herein "State" refers to both the State of California and Governor Wilson.

[2] The four tribes are the Cabazon and Sycuan Bands of Mission Indians, who filed the original action in 1990 (hereinafter referred to as the "original plaintiff tribes", and the Barona and Viejas Bands of Mission Indians who intervened in mid-1996, making claims identical to those of the original plaintiff tribes. Together, the four tribes will be referred to herein as the "Tribes."

The genesis of the present controversy stems from the inability in 1990 of the original plaintiff tribes to reach agreement with the State on a crucial jurisdictional issue in the course of negotiating their respective compacts with the State regarding the conduct by those tribes of off-track wagering on horse races, also known as simulcast wagering.[3]

The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, et seq., (hereinafter, "IGRA") authorizes tribes and states to negotiate and enter into such compacts on the subject of how such a tribe in such a state may engage in this form of class III gaming on its federal Indian reservation. One of the purposes of this authorizing statute is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments", 25 U.S.C. § 2702(1). The compacting process is a unique arrangement devised by Congress for multiple purposes, including the raising of revenue by tribal governments:

> In the Committee's view, both State and tribal governments have significant governmental

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[3] California allows live on-site wagering on horse races both at race tracks where the race is being run, and off-track wagering at other locations which are linked to the live race by the instantaneous electronic transmission of the audio and visual race signals from the live track to these remote "satellite" locations. The arrangement is known as "simulcast" racing and wagering at remote "simulcast facilities. Wagers placed at both the live location and these simulcast facilities are placed into a single parimutuel pool, and winners are paid at all locations from this pool.

> interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe[s] and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency, and Indian self-determination, and regulating activities of persons within its jurisdictional borders.
>
> Senate Report No. 100-446, 100th Cong., 2nd Sess., August 3, 1988, p. 13, reprinted in vol. 5 of *1988 U.S.C.C.&A.N.* 3071, 3083

Throughout the compacting process, one principle is clear: a state may not attempt to tax or otherwise profit from tribal governmental gaming under such a compact, beyond being reimbursed for its actual and reasonable costs of regulation. See 25 U.S.C. § 2710(d)(4). Even a request for such state taxation is *per se* an act of bad faith bargaining. 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

When the original plaintiff tribes were negotiating with the State on the subject of tribal operation of simulcast wagering facilities on their reservations, as described above, agreement was reached on all points but one. In general, the State and the original plaintiff tribes agreed to follow the same state statutory scheme for allocating and distributing the total amount wagered (known as the "handle") as applies to all non-tribal simulcast facilities.

This statutory scheme allocates stated percentages[4] of the handle to local governments,[5] to the state as a daily license fee,[6] to the state of administrative expenses, to pensions, to purses, to commissions, to horse registration, to breeder and stallion awards, to the California standardbred sires stakes program, to equine research, to winnings for successful wagers, etc.

The State and the original plaintiff tribes agreed that the tribes would receive the same 2% of the handle allocated by this state statutory scheme to all other simulcast facilities[7] as their commission, plus the 0.33% allocated to local governments[8] for providing governmental services. SCOTWInc., one of the proposed plaintiff-intervenor-appellants, would receive 1% for transmitting the simulcast signal and performing other functions.[9] Of whatever funds remain after all the above allocations and distributions to winning bettors, the other proposed plaintiff-intervenor-appellants (the racetracks[10]) would receive

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[4] These percentages vary somewhat by breed of horse being raced and the type of wagers placed. See California Business & Professions Code (hereinafter "B&P") §§ 19605.7, et seq. for the entire complex allocation scheme.

[5] B&P § 19610.4

[6] B&P § 19605.71

[7] B&P § 19605.71

[8] B&P § 19610.4

[9] B&P § 19605.71

[10] As used herein, the "Tracks" refer to the proposed plaintiff-intervenor-appellants, including Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course, and Los Angeles County Fair, but excluding Southern California

50%, and the horsemen participating in a particular race would receive the other 50%.[11]

The one point on which the State and those two tribes could not agree was whether the State's collection of its license fee on wagers placed at tribal simulcast facilities is permissible under IGRA. That fee varies from 1-4% of the handle, depending on the breed of the horse in a particular race and other factors. See B&P §§ 19611-19612.6.

Rather than allow an impasse on this issue to obstruct the compact negotiation process, the original plaintiff tribes and the State agreed in their respective compacts that the tribes could seek declaratory relief in the U.S. District Court on this question. Paragraph 19(B) of each compact provided that, if the final judgment in the anticipated litigation, after all appellate review, was that the fee was permissible under federal law, the State would retain the funds in its treasury, but that if the state license fee was determined to be impermissible in such a final judgment, the State would pay the accumulated disputed funds from its treasury to the tribes for the period up to the finality of the judgment (less the State's

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Off-Track Wagering, Inc., which will be referred to herein as "SCOTWInc." SCOTWInc. is an organization that transmits the simulcast audio and visual signals from the tracks where the races are being run to the various off-track or simulcast facilities. See B&P § 19608.2. Although it acts as agent of the tracks, it is compensated by a flat 1% rather than a percentage of the unallocated revenues. Thus, SCOTWInc. cannot have a claim to the disputed state license fee, as the Tracks assert in the form of their claim that this tax falls into this residual category.

[11] B&P § 19605.8(a)

actual regulatory costs), and thereafter the disputed funds would be distributed directly to the tribes. The actual language of paragraph 19(B)(3) of the Sycuan Band's compact[12] with the State is:

> In the event a final judgment is obtained that the deduction and distribution of the state license fee is impermissible under the [Indian Gaming Regulatory] Act, and following the exhaustion of all appellate review, **the State shall pay over to Sycuan the amount of the state license fee previously distributed to the State under this Compact,** exclusive of the assessments due and owing under subparagraph (4), below, **and Sycuan shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility. The amount of state license fee previously distributed to the State** and not reasonably claimed by the State as due and owing from the commencement of operation of the facility, and such pre- or post-judgment interest, if any, as the Court may determine, **shall be paid over to Sycuan as soon as practicable, and in any event not later than sixty (60) days following the entry of final judgment.** [emphasis added]

The above compact language is simple and clear. Depending on the final outcome of the planned litigation, either the State would keep the disputed funds itself, or it

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[12] Identical or equivalent language appears on the compacts of each of the four appellee tribes.

would pay to the Tribes both the money that had accumulated prior to final judgment, and the money that thereafter otherwise would be deducted and distributed to the State for the duration of the compacts.

The two original plaintiff tribes won the case on appeal to this Court in October of 1994.[13] Certiorari was not sought, so this Court's decision became final in January of 1995. The Tribes have been trying to collect their money ever since.

The amount at stake is large and growing larger by the day. The accumulated state license fee for all four appellee tribes already stood at over $11,000,000 as of March 31, 1996, and the State is collecting more license fees during the pendency of these appeals. Because of the State's intransigence and delaying tactics, the Tribes have been and continue to be deprived of funds with which they would pay the operating costs for their simulcast facilities, as well as provide the governmental services and programs that IGRA directs shall be funded with tribal gaming revenues.[14]

That is why the tribes have litigated this case. Enough money is at stake here to make a significant

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[13] *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

[14] IGRA requires that a tribe devote its net gaming revenues only "(i) to fund tribal governmental operations or programs; (ii) to promote the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; and (v) to help fund operations of local governmental agencies. 25 U.S.C. § 2710(b)(2)(B).

difference in the level of basic services (e.g., health care, paved roads, educational scholarships, senior nutrition programs, housing assistance, day care, fire protection, etc.) that the tribal governments, which have few if any other resources, can provide to their people. Many of these Indian people have been living in some of the most abject poverty of anyone in this country for literally centuries.

The tribes make this point not to elicit sympathy, but rather to show that the State is simply wrong in its effort to characterize its responsibility under the above compact language as merely determining whether the state license fee in this context is to a forbidden tax under IGRA. That is not the nature of this appeal. On the contrary, the primary interest at stake in this case and this appeal has *always* been the funds which the State simply does not want to pay to the Tribes.

Statement of the Case

The Cabazon and Sycuan Bands of Mission Indians entered into their tribal-state compact with the State in 1991. Each compact contained the above quoted language. The Secretary of the Interior approved each, and published his approval in the *Federal Register*. The compacts were then in effect. Those tribes then in 1991 entered into the first of a series of operating agreements with SCOTWInc. and the Tracks pursuant to their compacts and B&P § 19608.2 for the transmission of the simulcast signal from the various racetracks to the tribal simulcast facilities. The Barona and Viejas Bands entered into the first of similar series of operating agreements

with SCOTWInc. and the Tracks in 1992. Thus, the four tribes have been receiving the simulcast signal and operating their facilities since 1991-1992.

Meanwhile, the Cabazon and Sycuan Bands began litigating this case, as provided in their compacts. Initially, the District Court ruled in favor of the state, holding that there was no federal preemption of the state license fee in IGRA, primarily because the legal incidence of the tax was found to fall on the Tracks, rather than on the tribes. *See Cabazon Band of Mission Indians v. California*, 788 F.Supp. 1513 (E.D. Cal., 1992). However, this Court eventually reversed in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994)., finding that under IGRA's comprehensive preemption of the field of the regulation of gaming on Indian lands, the compacts, and not state law, control the distribution of the handle, and that under the compacts the tribes have a "right" to the disputed state license fee. In the final paragraph of its opinion, this Court remanded the case to the District Court.

> We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment [to the State] is reversed and remanded with instructions to enter summary judgment for the Bands.
>
> *Id.*, 37 F.3d at 435

When the State did not seek certiorari, the case was remanded to the District Court for what the Tribes anticipated would be a routine entry of judgment in their favor.[15]

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[15] Until the remand, the Barona and Viejas Bands of Mission Indians were not parties to the litigation because their

But that is not what happened. Instead, by letter dated May 31, 1995, the State informed all four appellant Tribes that this Court's decision in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994) rendered their four compacts invalid, and that therefore the State would cause SCOTWInc. to discontinue the simulcast signal as of July 1, 1995. To prevent the loss of the simulcast signal (without which no simulcast facility can operate), the original plaintiffs, the Cabazon and Sycuan Bands, filed motions for a temporary restraining order, and the Barona and Viejas Bands of Mission Indians filed complaints in intervention and similar motions. By its Order of June 30, 1995, the District Court granted the intervention and the temporary restraining order. On July 12, 1995 the District Court issued a further order directing not the entry of judgment in favor of the Tribes as this Court had directed, but rather that the Tribes file amended complaints and complaints in intervention seeking the recovery of the disputed funds and related relief. In doing so, the District Court rejected the motion of the Tribes for further relief under 28 U.S.C. § 2202, namely, the entry of judgment in favor of the tribes for

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compacts simply provided that they and the State would be bound by and follow the outcome of the litigation initiated by the Cabazon and Sycuan Bands regarding the disposition of the state license fee. When the State threatened to cut off the simulcast signal to their simulcast facilities, they had to act, and did so by seeking and obtaining leave to file complaints in intervention patterned after the complaints of the original plaintiffs, and Cabazon and Sycuan Bands, as they joined the other tribes in seeking and obtaining a temporary restraining order to prevent the loss of the simulcast signal. See the District Court's Memorandum of Decision and Order of June 30, 1995.

the payment of the accrued and future state license fees, as directed by this Court as the subject of the remand. Instead, the District Court wished to allow the State to assert its various defenses to the Tribes' amended complaints and complaints in intervention, and to assert its counterclaims against the Tribes.

The Tribes objected to having effectively to start their litigation concerning the disposition of the accumulated state license fees over again by filing amended complaints and complaints in intervention, and instead argued that all that was needed after this Court's explicit remand order was entry of judgment by way of their motion for further relief under 28 U.S.C. § 2202. However, the District Court disagreed.

To test whether such a new phase of the litigation was proper, two of the Tribes filed a petition for a writ of mandamus with this Court, requesting that the District Court be directed to follow this Court's remand order instead of requiring the four Tribes to file amended complaints and complaints in intervention aimed at recovering the funds which were the subject of the earlier appeal to this court. By its order of December 8, 1995, this Court denied the petition for a writ of mandamus, holding that, because relief by appeal was available, use of the extraordinary writ was unnecessary.

Accordingly, the four Tribes filed their amended complaints and complaints in intervention, seeking the same disputed state license fee funds as had been the original object of this case in 1990. The State filed its answers, asserting several affirmative defenses and counterclaims. The four Tribes moved to strike the affirmative defenses

and to dismiss the counterclaims. The District Court granted these motions in full by its Memorandum of Opinion and Order of April 26, 1996, which also directed the State to "report to the Court within 14 days as to how it will comply with the compacts in light of the ruling by the Court of Appeals." In response, the State submitted no such report, but instead filed a motion for reconsideration. By its Memorandum of Decision and Order of July 19, 1996, the District Court denied the State's motion for reconsideration and directed that "Within 14 days of this order the State shall pay over to the tribes the monies that have been assessed as a license fee on parimutuel offtrack wagering at the plaintiffs' simulcast facilities. . . . The court will not stay this order."

The State now appeals from this order directing actual payment of the sums which have accumulated to the credit of the four Tribes since 1991, and which this Court has already determined the Tribes have a "right."

Summary of Argument

Because this Court has already determined the merits of this case, this appeal is unnecessary. The District Court exceeded its jurisdiction on the remand of this case by requiring the Tribes to amend their complaints and allowing the State to raise new affirmative defenses and counterclaims. Instead, the District Court should have simply entered judgment in favor of the Tribes, as this Court directed. At this point, this Court should ignore all issues raised by the State's post-remand affirmative defenses and counterclaims, and instead re-remand the case to the

District Court with specific instructions to enter judgment in favor of the Tribes without any further proceedings.

However, if the Court wishes to consider the merits of the State's new affirmative defenses and counterclaims, the Tribes assert that the District Court was correct in determining that it did have jurisdiction to enforce the terms of the compacts, under not only 28 U.S.C. § 1331 and 1362, but also IGRA and federal common law. Similarly, the State's waiver of its immunity under the Eleventh Amendment is unconditional and sufficient to support both the declaratory and the monetary relief that the Tribes demand.

The District Court did not err in refusing to consider evidence as to the intent of the parties to the compacts because the language used is clear and unambiguous, and has already been definitively construed by this Court. The District Court was equally correct in striking the State's new affirmative defenses and dismissing its counterclaims. All were attempts to circumvent or to relitigate this Court's holding in *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir., 1995) that the *only* was that a state may obtain any jurisdiction over tribal governmental gaming on a federal Indian reservation is through a tribal-state compact so providing. The present compacts pertain only to state regulation of simulcast wagering within the simulcast enclosures, and therefore cannot be used to expand state jurisdiction beyond what is expressly provided for in those compacts.

The State's new counterclaims are also barred by Tribal sovereign immunity since they go far beyond the

narrow issue that the Tribes tendered to the Court in this litigation in addition to being an attempt to secure the jurisdiction that this Court denied to the State in *Sycuan, supra,* in the absence of a compact governing tribal gaming activities outside the simulcast enclosures.

I.

THE DISTRICT COURT ACTED IN EXCESS OF ITS JURISDICTION OR ABUSED ITS DISCRETION BY REQUIRING THE TRIBES TO FILE AMENDED COMPLAINTS AND COMPLAINTS IN ITVERVENTION [sic].

As a threshold matter, the Tribes must first point out what they believe was a wrong fork in the road taken by the District Court which, had it not been taken, would have avoided this appeal.

As noted above, **the underlying issue in this case** (i.e., whether the State or the Tribes is entitled to the money that would otherwise be deducted from the gross handle of wagers placed at the Tribes' simulcast facilities and distributed to the State as its license *fee*) **has already been finally adjudicated by this Court.** *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430 (9th Cir., 1994). The essence of the Court's analysis was:

> State law does not govern this case, however. Rather, the terms of the compacts control. [cit.om.] Under the Cabazon and Sycuan Compacts, if the Bands prevail in this litigation, the State is required to pay them the amount of the state license fee that the State receives from the racing associations based on wagers at Indian facilities. If the Bands lose, however, they will

> be deprived of this amount, which will go to the State. Contrary to the conclusion of the district court, the Bands do indeed have a "right" to the unpaid fees.
>
> *Id.*, 37 F.3d at 434.

The Court's ultimate holding and disposition were equally clear:

> We conclude that IGRA preempted the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands.
>
> *Id.*, 37 F.2d at 435

As the Tribes argued to the District Court on remand, once this court rendered the forgoing opinion and the State allowed it to become final by not seeking certiorari within the time prescribed therefor, the rights and liabilities of the parties became fixed as both the law of the case and as res judicata as between the parties for all further proceedings. All that remained for the district Court to do on remand was to carry out this Court's "instructions to enter summary judgment in favor of the Bands."

Had the District Court done as this Court had instructed, and had the State not then acted in accordance with those instructions, the Tribes would have been entitled to do exactly what they attempted to do on the remand: move for further relief under 28 U.S.C. § 2202 for further relief in the form of summary judgment in their favor for the declaratory and monetary relief demanded in the original complaints.

Had events transpired as this Court had ordered, the circumstances leading to the present appeal would never have occurred. Instead, the Cabazon and Sycuan Bands were forced to seek further relief from the District Court in the form of a temporary restraining order to prevent the State from unilaterally abrogating their compacts and causing SCOTWInc. to terminate the simulcast signals upon which all simulcast facilities depend to operate, based upon the State's astonishing announcement that this Court's final judgment did not entitle the Tribes to payment, but rather somehow invalidated the compacts and excused the State from payment. Similarly, the Barona and Viejas Bands had to seek and obtain leave to intervene and the same temporary restraining order to prevent the same actions by the State directed toward them.

The District Court did grant the requested temporary restraining orders on June 30, 1995. CR 67. However, rather than implementing this Court's instructions on remand by granting the Tribes' simple motion for further relief under 28 U.S.C. § 2202, the District Court conditioned implementation of this Court's holding and instructions on remand upon the Tribes' filing of amended complaints and complaints in intervention alleging the State's violation of the compacts, thereby allowing the State to assert new affirmative defenses and counterclaims having nothing to do with the parties' rights and obligations as previously finally adjudicated by this Court. The District Court's reasoning was as follows:

> A motion under § 2202 is an appropriate method by which to resolve the State's claim that the

> Ninth Circuit decision was in some way so unexpected as to invalidate the compacts. This question is very much of a piece as the original declaratory relief action that the parties agreed to in the compacts. However, a motion under § 2202 is not the appropriate way to consider the Bands' claim that the State is now in breach of the compacts. This claim arises from actions by the State after the Ninth Circuit decision and involves a host of new issues, particularly the Stat's [sic] counterclaim or defense that its obligation to adhere to the compact has been voided by the Bands' alleged illegal activity. [cit.om.]
>
> Accordingly, the Bands must amend the complaints now on file to seek relief for breach of the compacts under IGRA. The State may then amend its answer to assert any defenses or counterclaims that it may have to this claim. The Court cannot resolve the Bands' claim to the funds and to continuation of the compacts on the basis of the pleadings now filed.
>
> Memorandum of Opinion and Order of July 12, 1995, p. 12, line 25 to p. 13, line 19; ER 12-13; CR 74, pp. 12-13

Requiring the Tribes to file amended complaints and complaints in intervention vastly and inappropriately expanded this litigation far beyond its original scope, which was simply to determine which of the two parties to the respective compacts, either the Tribes or the State, was entitled to receive the accumulated and future state license fee, and far beyond the scope necessary to implement this Court's decision and grant the Tribes the relief to which this Court determined they were entitled. To avoid this needless expansion and prolongation of the litigation, and its attendant cost and delay, the Tribes first

sought and failed to obtain further relief from the District Court under 28 U.S.C. § 2202. When that motion was denied, the Tribes sought reconsideration. When the District Court denied that motion, the Tribes petitioned this Court for a writ of mandamus, which was denied because this Court found that any errors by the District Court could be rectified by appeal.

Since January of 1995 the Tribes have been seeking no more than implementation of this Court's final, unappealed, and unappealable determination that "the Bands do indeed have a 'right' to the unpaid fees"[16] based on compact language, identical or equivalent for all four Tribes, that "the State shall pay over to Sycuan the amount of all state license fees previously distributed to the State under this Compact . . . ".[17]

Simple entry of judgment directing such payment is all that the District Court needed to do, and all that the District Court was empowered to do on remand to implement this Court's instructions. Thus, this Court can and should end this protracted litigation at this point by holding that the District Court erred in denying the Tribes' motion for further relief, and remanding again to the District Court with specific instructions to enter judgment in favor of the Tribes, expressly including an order to the State to account for and to pay to the Tribes the accrued and future state license fees generated at the Tribes' simulcast facilities since their respective inceptions, and to direct SCOTWInc. in the future to pay over

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[16] 37 F.3d at 434

[17] Sycuan Band Compact, paragraph 19(b)(3)

to the Tribes all money that would otherwise be distributed to the State as its license fees for the durations of the compacts.

Should this Court determine that the merits of the State's appeal need to be addressed further, the Tribes' responses to the State's arguments follow.

II.

THE DISTRICT COURT DID HAVE JURISDICTION TO ENFORCE THE TERMS OF THE COMPACTS.

The District Court concluded that it did have jurisdiction to hear the breach-of-compact claims that it had required the Tribes to file in amended complaints and complaints in intervention based on this reasoning:

> IGRA specifically provides that a Tribe may bring suit in federal district court against a State that fails to negotiate a compact in good faith. 25 U.S.C. §2710(d)(7)(A). It would be extraordinary were the statute to provide jurisdiction to entertain a suit to force the State to negotiate a compact yet provide no avenue of relief were the State to defy or repudiate that very compact. Such a gap in jurisdiction would reduce the elaborate structure of IGRA to a virtual nullity since a state could agree to anything knowing that it was free to ignore the compact once entered into. IGRA is not so vacuous. The statute provides that a compact may provide "remedies for breach of contract." §2710(d)(3)(C)(v). Here the compacts include a provision that "Judicial review of any action taken by either party under this Compact shall be had solely in the appropriate United States

> District Court." Further, the compacts all include provisions that the compact shall remain in force unless "determined to be invalid by a court of competent jurisdiction," that either party may bring suit to amend the compact in a "court of competent jurisdiction"; and that "the compact shall be governed by and construed in accordance with the laws of the United States." These provisions provide for an action for breach of the compact in federal district court just as IGRA envisions. Because IGRA expressly authorizes a compact to include remedies for breach of compact, and because IGRA's grant of jurisdiction to require good faith bargaining would be pointless were there no jurisdiction to enforce the compact, jurisdiction to enforce the compacts is created by IGRA and 28 U.S.C. §§1331 and 1362."
>
> Memorandum of Decision and Order, July 12, 1995, p. 8, line 16 to p. 9, line23

In support of this conclusion, the District Court cites two appellate cases.

In *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 538 (9th Cir., 1995), this Court held that the District Court did have jurisdiction over an action by three of the very same tribal plaintiffs as those now before the Court, there seeking an injunction against the criminal prosecution of certain tribal officials. The stated basis for this jurisdiction was: "Section 1331 is enough; this case clearly arises under federal law, be it IGRA or the federal common law of Indian affairs that allocates jurisdiction among the federal government, the tribes and the states." This is the same conclusion reached by the Seventh Circuit in *Forest County Potawatomi Community v. Norquist,* 45

F.3d 1079, (7th Cir., 1995): "That right, if it exists, is a federal right whether its source is the IGRA, the Compact, the Indian Commerce Clause or federal recognition of the inherent sovereign powers of an Indian tribe."

In both of these cases, it was not necessary to determine whether the precise source of the right to be enforced was IGRA or federal common law or, in the second case, a tribal-state compact. In any event the source of the right to be enforced, if it existed at all, was unquestionably federal in nature. In the present case, the source of the Tribes' right to the payment of the disputed state license fee funds is either the above express language of the compacts, IGRA itself (as elucidated by the District Court), or the federal common law, in this case, most notably this Court's second opinion of 1994 in this very case. Under either *Sycuan, supra,* or *Forest, supra,* this is sufficient basis for federal question jurisdiction. Although the payment in question here does have a contractual aspect, it is not a purely contractual question, as the State claims, and rather originates not in contract but in the federal preemption of the imposition of that state license fee which this Court found to occur because "the Bands bear the actual burden of the license fee."[18] The contractual aspect of this question, however, is addressed by the language of 25 U.S.C. §2710(d)(3)(C)(v) authorizing compacts to include language on the issue of "remedies for breach of contract" to the extent that such a remedy is not otherwise provided.

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[18] 37 F.3d at 434

The State seems to contend that the District Court lacked subject matter jurisdiction because the Tribes' action was, in reality, nothing more than a garden-variety action for breach of contract, and thus not one arising under federal law. Alternatively, the State argues that the District Court lacked jurisdiction because no specific federal statute grants jurisdiction to District Courts to enforce compacts as political agreements made between State and Tribal sovereigns. (State's Opening Brief, pp. 14-15). The State may be correct that this is not a garden-variety action for breach of contract (although certain principles of contract interpretation may have aided the District Court in its interpretation of the language of the compacts), but that never has been the basis for the District Court's jurisdiction in this action.

What the State's argument ignores is that the original basis for the District Court's jurisdiction was the federal question of whether distribution to the State of the license fee on wages placed at the Tribal simulcast facilities is permissible under IGRA. The compacts themselves are creatures of federal law, and thus the subsequent proceedings have been nothing more than further proceedings to implement the judgment that the District Court should have entered in favor of the Tribes upon receipt of this Court's mandate. Where a District Court has subject matter jurisdiction over the subject matter of an action for declaratory relief, the District Court has jurisdiction to grant further relief in order to give effect to its declaratory judgment. *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir., 1987); *Omaha Indemnity Insurance Co. v. Cardon Oil Co.*, 687 F.Supp. 502 (N.D. Cal., 1988), *aff'd*. 902 F.2d 40 (9th Cir., 1990). Indeed,

28 U.S.C. §2202 allows a District Court to fulfill "the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective." *Horn & Hardart, supra,* 843 F.2d at 548.

For these reasons, the Tribes urge the Court to conclude that the District Court did have jurisdiction over the breach-of-compact claims that it required them to file as such.

III.

THE STATE DID WAIVE ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT IN THIS CASE.

The District Court held that the State had waived any immunity it might have in this case under the Eleventh Amendment:

> The State has waived its Eleventh Amendment immunity in the compact language cited above.[19] *See Port Authority Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 305 (1990). The compact language clearly and unequivocally subjects the suit in federal district court. The *Port Authority* Court found waivers fo [sic] the Eleventh Amendment where the states involved expressly submitted to suit in either state or federal district court. *Id.,* at 307. Here the waiver is even more readily apparent, where the State agreed to suit in federal district court alone. The State's claim that the compacts only subject the State to

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19 This language appears on pp. 8-9 of the Memorandum of Opinion and Order of July 12, 1995, quoted above.

> suit for declaratory relief is not borne out by the compact language which provides for judicial review of "any action taken by either party under this Compact." This sweeping language waives immunity for suit to enforce the compacts.
>
> Memorandum of Opinion and Order, July 12, 1995, p. 10, lines 10-24

The State apparently concedes that it did waive its immunity in the initial phase of this case, through this Court's second opinion of 1994 and the remand order. But the State argues that, even if it did consent to declaratory relief against it concerning the propriety of the imposition of the state license fee, it did not consent to actual payment of the disputed sums, and certainly did not consent to surrendering the State's taxing power over the racing associations for the benefit of the Tribes.

The short answer to the State's position is that the State's waiver is not qualified or limited in any way except by the terms of the compact language itself. Nothing in that language circumscribes the District Court's power to effectuate the judgment mandated by this Court. Furthermore, even though the accrued state license fee funds themselves are held in the State Treasury, they are derived not from general state tax revenues but rather from the funds collected and distributed to the State Treasury by SCOTWInc. from wagers made at the Tribes' simulcast facilities on the contingent basis described in the compacts. The State has just made a long-term interest-free loan to itself of these third-party funds during the six-year pendency of this litigation.

As for the claim that the waiver did not extend to the actual payment of the disputed sums, the Tribes have already discussed how the focus of this litigation has *always* been on the Tribes' efforts to recover the disputed funds, precisely because deprivation of those funds is just the economic burden that this Court found to be preemptive. Had the State's waiver been only for a declaratory judgment as to the permissibility of the State's imposition of these fees on the Tribes, without any actual payment involved, then the action would have been advisory in nature, not a fit subject for a declaratory judgment, and presenting no case or controversy. But this Court has a duty *sua sponte* to review appeals for mootness, standing, jurisdiction, etc. even if the parties do not raise the issue. Because this Court apparently found no such defects, it presumably determined that the State's waiver in this case was sufficient to cover not only the academic determination of whether the imposition of the state license fee was permissible under federal law, but also the actual payment that was the subject of the remand. Therefore, the Tribes submit that the State's waiver of its Eleventh Amendment immunity was sufficient to cover all aspects of this case through the first appeal of 1994 and the intended remand to implement the mandate of this Court.

As for the claim that the State's waiver cannot be construed as a surrender of the State's power to tax the racing associations, the Tribes' primary response is that the State mischaracterizes the issue. The real issue on this appeal is what it has always been: did the District Court have the power to implement the judgment which this Court directed it to implement? Again, the State refuses to accept this Court's conclusion that "State law does not

govern this case, however. Rather, the terms of the compact control."[20] Instead, the State attempts to re-assert state law arguments which this Court has already rejected. The compact language controls, and that language simply does not say that the State is obligated to pay the disputed funds only if the state license fee is determined to be a forbidden tax on the tribes. That language does not distinguish among the various bases on which this Court could have determined that the Tribes are entitled to the disputed funds. Although framed in several ways, the State's position here is just an attempt to evade its responsibilities under the language of the compacts to which it agreed, and to relitigate the merits of the issues determined by this Court in its second opinion of 1994.

The Tribes' secondary response to this claim is that the same could be said even if the basis for a decision favorable to the Tribes by this Court on the merits of which party was entitled to the disputed funds had been that the state license fee was a direct tax on the Tribes forbidden by IGRA. In either case, no matter what the basis of the Court's favorable opinion had been, the State would still be in the position of paying the Tribes the sums collected as the state license fee from wagers placed at the Tribes' simulcast facilities: "the State shall pay over to Sycuan the amount of all state license fees previously distributed to the State under this compact . . . " (Sycuan Band Compact, paragraph 19(B)(3).

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[20] *Cabazon Band of Mission Indians v. Wilson*, 37 F.2d 430, 434 (9th Cir., 1994

Therefore, the District Court properly concluded that the State waived whatever immunity it might have had under the Eleventh Amendment, and this Court should do the same.

IV.

THE DISTRICT COURT DID NOT ERR IN REJECTING THE STATE'S REQUEST TO PRESENT EVIDENCE AS TO THE PARTIES' SUPPOSED INTENT REGARDING THE LANGUAGE OF PARAGRAPH 19(B)(3) OF THE COMPACTS.

The State claims that the following critical compact language is susceptible to more than one meaning, is sufficiently ambiguous to justify a factual inquiry into its meaning, and is a genuine issue of material fact so as to preclude summary judgment:

> In the event a final judgment is obtained that the deduction and distribution of the state license fee is **impermissible under the** [Indian Gaming Regulatory] **Act,** and following the exhaustion of all appellate review, the State shall pay over to Sycuan the amount of all state license fees previously distributed to the State under this compact . . .
>
> Sycuan Band Compact, paragraph 19(B)(3), emphasis added

The State claims that the parties intended **impermissible under the Act** to mean only impermissible under IGRA in the sense that the state license fee amounted to a tax on the Tribes, as specifically forbidden by 25 U.S.C. §2710(d)(4).

This language is clear and unconditional on its face. It certainly does not even suggest such a limited reading as the State urges. For this reason, the Tribes urge the Court to conclude that the State is attempting to re-litigate this Court's controlling opinion in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir., 1994), and particularly the Court's remand to the District Court "with instructions to enter summary judgment for the Bands."[21] Presumably, if this Court believed that the above critical language was ambiguous, then such a remand for entry of summary judgment would have been ambiguous.

Nor is it logical to believe that the parties might have intended this cramped meaning of otherwise clear and unambiguous language. When the parties negotiated the above language in their compacts and litigated this case, they had no idea what its eventual outcome might be, beyond a common belief that the issue of to which party the disputed sums belonged would be resolved. Neither party could predict the exact basis on which the Court might choose to rest its decision. That is why the critical language is unqualified: **impermissible under the Act** is intentionally broad enough to cover virtually any analysis that the Court might adopt in resolving the basic issue of to which party does the disputed fund belong. To suggest now that this otherwise unambiguous and unqualified language is actually ambiguous because of a meaning secretly attributed to it by one party strains the bounds of credulity. If the State had intended this strained meaning of **impermissible under the Act,** it

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[21] 37 F.3d at 435.

could and should have negotiated other language which reflected this intention.

This result, that the parties to a compact must live with the terms that they have negotiated, is reflected in both case law and the legislative history of IGRA that authorized the compacts:

> At this point, plaintiff must settle for the compact to which it agreed. The intent of the Indian Gaming Regulatory Act was to provide a framework by which Indian tribes and states would work together to provide a mutually agreeable plan for Indian gaming. As stated in the Senate Report,
>
> "[t]his legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." S.Rep. No. 100-446 at 6, 1988 U.S.C.C.A.N. at 3076.
>
> This congressional purpose is undermined if either a tribe or a state can go back on the terms agreed to in the compact in the absence of compelling reasons.
>
> *Wisconsin Winnebago Nation v. Wisconsin*, 824 F.Supp. 167, 172 (W.D. Wisc., 1993)

This case is especially apt because it is an example of a federal court rejecting a claim by a party to a compact that an unanticipated judicial interpretation of the terms

of a compact should serve as the basis for reopening the compact.

At the bottom half of p. 31 of the State's opening brief, the State advances an argument which the Tribes cannot fathom. The heart of the argument seems to be that "the Tribes" 'right' to the unpaid fees is dependent upon a determination that collection of the license fee is impermissible; *i.e.*, the 'right' does not arise *unless* the tax is impermissible." But this Court has already determined that "the Bands do indeed have a 'right' to the unpaid fees"[22] and did so without any qualifications or linkage to a finding that the state license fee is preempted by federal law in this case. Likewise, at the end of its analysis, when this Court concluded that "The express objectives of IGRA, when combined with the Bands' interests, preclude the application of the State's license fee",[23] there was no linkage to the previous finding that the Tribes have a "right" to the disputed funds, and that conclusion of federal preemption was not conditional on any such finding. Thus, at most, the State's argument on this point is circular; at worst disingenuous.

The State's somewhat similar, but equally circular, argument at pp. 32-33 fails for the same reasons. The Tribes will only add that the Court's determination that "the Bands do indeed have a 'right' to the unpaid fees" is definitely not dicta, but rather is an essential predicate to the Court's conclusion, in the next sentence, that "The

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[22] 37 F.3d at 434.

[23] 37 F.3d at 435.

licensing scheme currently imposed thus constitutes an economic burden"[24] and thus is preempted.

The State's protest, at p. 34, that "the district Court's construction of Paragraph 19(B)(3) will expose the State to suit by those whose property has been taken without due process of law . . . " is simply not so. This Court already rejected this same argument:

> The district court reached a conclusion opposite from our own, reasoning that under California law, surplus revenue is to be divided between the racing association and the horsemen. Cal. Bus. & Prof. Code §§ 19605.8 & 19606. . . .
>
> State law does not govern this case, however. The terms of the compact control
>
> *Cabazon band of Mission Indians v. Wilson*, 37 F.3d 430, 434 (9th Cir., 1994)

To the extent that the racing associations may make such a claim against the State, the State is amply protected by this Court's above determination that the terms of the compacts prevail over conflicting provisions of state law. This is the essence of federal preemption. The California Supreme Court has recognized such federal preemption in the field of Indian affairs in *Boisclair v. Superior Court*, 51 Cal.3d 1140, 1150 (1990). Given this Court's explicit determination of federal preemption regarding the very issue previously litigated, there is no reason to believe that the California courts will be any less receptive to a conclusion of federal preemption if the racing associations bring any such claim as the State fears.

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[24] 37 F.3d at 434.

Because this critical language from all of the compacts is clear, unambiguous, and unqualified on its face, the Tribes urge the Court to conclude that the District Court did not abuse its discretion by refusing to conduct an evidentiary inquiry into what one party's unstated intentions were. In any event, this Court has already considered the compact language claimed to be ambiguous and has determined that the disputed state license fee is impermissible under the Act. Furthermore, in an attempt to avoid this Court's holding on the merits, the State advanced all these arguments in its petition for rehearing, which this Court rejected. For all these reasons, there is now no basis for a claim that the district Court abused its discretion by not allowing the State to present evidence to support an argument already definitively rejected by this Court once on the merits, and once in denying rehearing.

V.

THE DISTRICT COURT WAS CORRECT IN DISMISSING THE STATE'S COUNTERCLAIM THAT THE COMPACTS ARE INVALID BECAUSE THE WAGER DISTRIBUTION FORMULA DOES NOT SEEK TO DEPRIVE OTHERS OF THEIR STATUTORY SHARES.

In part IV of its Opening Brief, the State claims that the District Court erred in dismissing the State's third counterclaim which asserted that the compacts must all be invalid because the racing associations derive a greater financial benefit from the simulcast wagering than do the Tribes, so that the Tribes are not the "primary beneficiaries" of the simulcast activity. The argument seems to be that, to be valid, a compact must allocate revenues in

such a way that a tribe must derive more funds from the gaming activity than any other party who receives any funds under the compact. Such a claim is simply wrong.

The reference to the tribe being the "primary beneficiary" of the gaming operation is in IGRA's Congressional declaration of policy: "The purpose of this chapter is – . . . to insure that the Indian tribe is the primary beneficiary of the gaming operation . . . " 25 U.S.C. §2702(2). This Court cites and relies on this language at p. 433 of its second 1994 opinion. To understand what this language means requires a bit of history.

Before IGRA was passed in 1988, various unscrupulous non-Indian managers had entered into management contracts with certain tribes for very long terms of years and with high percentages of the net profit paid to the manager. Such contracts were subject to the requirement of 25 U.S.C. §81 that they be approved by the Secretary of the Interior to be valid. Some which lacked such approval were invalidated by this Court. For example, one of the current Tribes sought invalidation of such an unapproved management contract in *Barona Band of Mission Indians v. American Management & Amusement, Inc.* 840 F.2d 1394 (9th Cir., 1987). This Court invalidated the contract for, among other things, having a term of 25 years when the then current pre-IGRA guidelines for approval limited such terms to 5 years, and limited the percentage payment to the manager to 49% when those guidelines limited such fees to a lesser percentage. *Id.*, 840 F.2d at 1406-7.

It was against this kind of overreaching by non-Indian managers that Congress acted in IGRA expressly

to limit the term of management agreements to 5-7 years and management fees to 30-40%, and added several other similar protective measures:

> The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least –
>
> (1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;
>
> (2) for access to the daily operations of the gaming to appropriate tribal officials who shall have a right to verify the daily gross revenues and income made from any such tribal gaming activity;
>
> (3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;
>
> (4) for an agreed ceiling for the repayment of development and construction costs;
>
> (5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but that does not exceed seven years [under stated conditions] . . .
>
> 25 U.S.C. §2711(b)

Similarly, 25 U.S.C. §2711(c) limits managers' fees to 30-40%. The Senate Committee Report reflects the protective purpose of these limitations:

> Some of the [management] contracts, approved or not, have been shown to be clearly unconscionable, and the members of the Committee

> believe that term of years and fee percentages set forth in the bill are adequate to protect any legitimate investor.
>
> Senate Report No. 100-446, 100th Cong., 2nd Sess., p. 15, August 3, 1988; reprinted in vol. 5 of 1988 U.S.C.C.&A.N. 3071, 3085

It was in this protective sense that Congress intended that tribes be the "primary beneficiaries" of their gaming enterprises. Congress simply wanted to eliminate the unconscionable terms found in some pre-IGRA management contracts by requiring approval of such contracts only if they met the stated minimum federal standards so as to benefit and protect the tribes.

Thus, what Congress had in mind in IGRA was simply establishing a set of minimum federal standards for the Chairman of the National Indian Gaming Commission to use to determine whether to approve a management contract or not. These standards would insure that the tribe was the "primary beneficiary" of the gaming operation under IGRA, rather than the non-Indian manager as was often the case pre-IGRA. This language does not mean that any arrangement is invalid if any other party happens to derive more financial benefit from the operation than does the tribe. The intended limitation is on the non-Indian manager whose pre-IGRA over-reaching was the reason for the limitation on him. In the context of simulcast wagering on horse races, it makes much sense for the racing associations (which operate the racetracks and all their support facilities) and the horsemen (who provide the horses, their training, board, care, etc.) to split whatever amounts are left over after all the statutory deductions because those two groups have by

far the greatest expenses in staging the races. If those two groups wind up receiving more in absolute dollars than do the Tribes, it is because they have much greater expenses.

This is also the sense in which this Court has used the term "primary beneficiary" on p. 433 and p. 435, fn. 2 of its second 1994 opinion. There the Court compares the amounts received by the Tribes with those received by the State, but not with the amounts received by any other party. There is no non-Indian manager in the case of a compact, unlike a management contract, but the idea is the same: to guarantee that the tribe is the "primary beneficiary" of the gaming enterprise *as compared with the other party with whom the tribe is negotiating,* whether that other negotiating party is a non-Indian manager or a state. In either case, Congress wishes to limit over-reaching by whichever other party is negotiating with a tribe. Congress simply did not address the issue of whether a major vendor who was not a manager (and whose prices are largely fixed in advance) could wind up deriving more economic benefit from a tribal gaming operation than a tribe. Congress did address the issue of overreaching by a party who does negotiate with a tribe and whose economic benefits from the arrangement are fixed through that negotiation.

It is strange that the State would even make this argument. Would the State really have preferred if the negotiating tribes had demanded that the State agree to reduce the statutory amounts that other parties involved in simulcast wagering receive? Doing so would have produced the same kind of taking of property which the State says it so wishes to guard against. Instead, all that

has happened is that the Court has determined that, within the overall complex statutory scheme for the distribution of various percentages of the handle from simulcast wagering to many parties, one item (the state license fee of 1-4%) has been preempted so that it and it alone goes to the Tribes, rather than to the State. Doing so does make the Tribes the "primary beneficiaries" of their simulcast operations, *as compared with the State*. No more is required.

Furthermore, as each of the various recipient groups or organizations except the State, takes its statutorily-prescribed percentage of the handle, that recipient is effectively being compensated for goods actually provided or services actually rendered to the Tribe[25] as the operator of a simulcast facility. Only the State itself is not effectively a vendor in this overall scheme. Only the State can be viewed as providing anything like management services, and that in the sense of the State providing the same degree of regulation and oversight of the Tribes' simulcast facilities as it does to other such facilities, and being compensated separately under paragraph 19(b) of the compacts, *in addition to the disputed State license fee*, for doing so. In this additional sense, it is appropriate for the determination of who is the "primary beneficiary" of the simulcast operation to consider only the Tribes and the

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[25] Such services are rendered either directly to the Tribe, such as with SCOTWInc. which receives 1% for transmitting the simulcast signal, handling parimutuel wagers, etc., or indirectly, such as with the one-tenth of 1% that goes to equine research at the California Veterinary diagnostic Laboratory System under B&P §19610.2, which research benefits the horse racing industry in general, including the Tribes' simulcast operations.

State. In approving the subject compacts, the Secretary of the Interior has determined that the costs to the Tribe of participating in the simulcast system, according to the terms of the compacts, are reasonable, and the State has no standing to complain that the Tribes' participation in the system is more costly to the Tribes than the State thinks appropriate.

VI.

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE STATE'S COUNTERCLAIM TO ENJOIN THE TRIBES' SUPPOSEDLY ILLEGAL ACTIVITIES OUTSIDE THE SIMULCAST ENCLOSURES.

A. By its counterclaims, the State seeks to re-litigate *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir., 1995).

The State participated as an amicus curiae in *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache, et al.,* 54 F.3d 535 (9th Cir., 1995). In that case, this Court upheld the District Court's injunction prohibiting the San Diego County District Attorney from prosecuting those arrested in conjunction with raids staged by the San Diego County sheriff at the gaming establishments of three of the present four appellee Tribes. The basis for doing so was this Court's determination that, with the passage of IGRA, California's gambling laws had become federalized, with jurisdiction to enforce them *exclusively* in the United States except as the affected Tribes and the State might provide otherwise in a tribal-state compact covering the locations in question.

When the District Court in the present case required the Tribes to file amended complaints and complaints in intervention, the State filed a counterclaim seeking an injunction against the Tribes to restrain them from engaging in the very same allegedly illegal activity as was the subject of *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir., 1995). By this counterclaim, the State attempted vastly to expand the scope of the present litigation so effectively to relitigate *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache, supra.* For the following reasons, the State should not be permitted to evade both its loss in *Sycuan v. Roache, supra,* and the sovereign immunity of the Tribes as to matters far beyond the scope of the Tribes' present narrow claims.

B. The District Court jacked [sic] **personal jurisdiction over the Tribes as to the State's counterclaims due to Tribal sovereign immunity.**

Even in their expanded form in the amended complaints and complaints in intervention, the Tribes' claims in the present case are simple and narrow. In their first claims for relief, the Tribes seek a declaration that IGRA preempts the State's license fee on the handle of their simulcast operations within their respective simulcast enclosures and that the sums stated in the compacts are due to the Tribes, plus an accounting and actual payment of those amounts, as directed by this Court in its second 1994 opinion in this case. In their second claim for relief, the Tribes seek a declaration that the State's failure to abide by the mandate of this Court in *Cabazon Band v. Wilson, supra,* deprives the Tribes of property under color

of state law in violation of 42 U.S.C. § 1983, plus attorneys' fees under 42 U.S.C. § 1988. That is all. The Tribes ask for no relief concerning any other matter beyond these points growing directly out of the State's collection of its license fee on the handle of simulcast wagering within the simulcast enclosures at the Tribes' respective simulcast facilities. The Tribes do not even mention any supposed other forms of class III gaming which the State alleges to be occurring, but outside the simulcast enclosures which are governed by the Tribes' respective compacts.

The Tribes' moved for dismissal of this extraneous counterclaim in the District Court based on *McClendon v. U.S.*, 885 F.2d 627 (9th Cir., 1989). In *McClendon*, the United States, on behalf of a tribe, had sued the predecessors in interest of the McClendons to eject them from land which the United States claimed was part of the tribe's reservation. This initial action was a simple ejectment action seeking to establish title to the land in the United States in trust for the tribe. That litigation was later settled by a consent decree to the effect that all parties agreed that the land in question was a part of the tribe's reservation, but the Tribe agreed to lease it to the McClendons on favorable terms. Later, the McClendon's brought an action against the tribe and its trustee the United states seeking a declaration that certain actions by the tribe constituted a breach of the lease. The McClendon's argued that, by having its trustee initiate the previous ejectment action, the tribe had consented to suit regarding the interpretation of the lease. This Court rejected this claim:

> McClendon argues that the 1972 suit constituted a waiver of immunity against actions to enforce the terms of the lease agreement. . . . The 1972 action merely sought a declaration of land ownership. . . . By initiating the 1972 action, the Tribe merely consented to the court's jurisdiction to decide ownership of the land in question. The initiation of the suit, in itself, does not manifest broad consent to suit over collateral issues arising out of the settlement of the litigation, such as interpretation or enforcement of the lease agreement. [cit.om.] We conclude that disputes over interpretation of the 1984 lease agreement are collateral disputes, and are not so inextricably linked with the 1972 suit that initiation of the latter, in itself, constitutes consent to suit over the former.
>
> *McClendon v. U.S.*, 885 F.2d 627, 630-631 (9th Cir., 1989)

This Court in *McClendon* reached this conclusion based on the well-established principle that, when initiating a suit, a sovereign necessarily consents to the jurisdiction of the court to decide all issues raised by the sovereign's complaint, but not related issues whose resolution might be desirable, but which go beyond the scope of the original complaint. In rejecting a claim that that [sic] it was unfair to allow a sovereign thus effectively to define the scope of its waiver of its sovereign immunity, this Court expressly relied on what the Supreme Court had to say on the subject:

> McClendon argues that allowing the Tribe to sue without exposing itself to suit for related matters is unfair. However, as the Supreme Court

> has noted, "[t]he perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances. *Three Affiliated Tribes v. Wold Eng'g.*, 476 U.S. 877, 893, 106 S.Ct. 2305, 2314, 90 L.Ed.2d 881 (1986).
>
> *McClendon, supra,* 885 F.2d at 631

This result in *McClendon* should come as no surprise. It is well-settled that, by filing an action, a tribe does not consent to a counterclaim against it, even if that counterclaim would be otherwise compulsory under Rule 13:

> Petitioner acknowledges that Indian tribes generally enjoy sovereign immunity, but argues that the Potawatomis waived their sovereign immunity by seeking an injunction against the Commission's proposed tax assessment. It argues that, to the extent that the Commission's counterclaims were "compulsory" under Federal Rule of Civil Procedure 13(a), the District Court did not need any independent jurisdictional basis to hear those claims.
>
> We rejected an identical contention over a half-century ago in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512, 60 S.Ct. 653, 655-656, 84 L.Ed. 894 (1940). In that case, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian Tribe because the Tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be

> brought against it merely because those actions were pleaded in a counterclaim to an action filed by the Tribe. *Id.*, at 513, 60 S.Ct., at 656. "Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." *Ibid.*
>
> *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)

Therefore, since the Tribes have not consented to State's counterclaims, either by initiating this action or otherwise, the District Court should have dismissed them as barred by the Tribes' sovereign immunity. This is especially so when the subject of those counterclaims goes far beyond the narrow scope of the Tribes' claims.

In addition, the Tribes also argued to the District Court that entertaining these counterclaims, with their allegations that the Tribes are engaged in forms of class III gaming without the benefit of a compact, is inconsistent with the language of IGRA. 25 U.S.C. §2710(d)(7)(A)(ii) confers on the district courts jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands *and conducted in violation of any Tribal-State Compact entered into under paragraph (3) that is in effect.*" (emphasis added) By negative implication, Congress intended that the district courts would *not* have jurisdiction over such claims if no such compact regarding such gaming is in effect, as alleged by the State; such jurisdiction exists *only* if such a compact *is* in effect. This is one of the incentives for a State to enter into such a compact in the first place.

However, the District Court did not accept these arguments. Instead, it found a waiver of Tribal sovereign immunity in the following language from the compacts: "Judicial review of any action taken by any party under this Compact, or seeking an interpretation of this compact, shall be had solely in the appropriate United States District Court."[26] For the following three reasons, the Tribes submit that this language does not amount to such a waiver of Tribal sovereign immunity as to the State's counterclaims.

First, even if this language is a waiver, it is a waiver only as to "any action taken by any party *under this Compact.*" (emphasis added). As a factual matter, it must be pointed out that the geographical scope of the simulcast compacts of the four Tribes is limited by their terms to only the simulcast enclosures.[27] The compacts allocate

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[26] Memorandum of Opinion and Order, April 26, 1996, p. 16, lines 1-12.

[27] One of the recitals in each such compact is that both the State and the affected tribe "each recognize the sovereign authority and interests of the other in regulating gaming activities within their respective areas of jurisdiction" (Barona Compact, p. 1, fifth Whereas clause). By this recital, the State has recognized that, outside that portion of the affected tribe's reservation that makes up the simulcast enclosure, the State has no interest or jurisdiction to regulate any form of gaming on that tribe's reservation.

Similarly, the Barona Band's compact is replete with references which limit the State's authority under the compact to *only* that simulcast enclosure, and to no area or activity outside it. For example, in recognition of the fact that, when the compact was executed in 1992, the Barona Band already had a bingo facility constructed and operating, and a card room under construction, while the simulcast facility was still in the

regulatory jurisdiction largely to the State for activities occurring within those simulcast enclosures, but nowhere

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planning stage, paragraph 6.2, p. 2, of the Barona Band's compact recites these facts and requires the approval of the California Horse Racing Board for *only* the planned simulcast facility, and *not* for the existing bingo hall or the card room then under construction:

> *Modification of Present Gaming Facility.* Barona presently operates a gaming facility, known as Barona Indian Gaming. . . . In this 2,200-seat hall, Barona now offers bingo. Now under construction and expected to open in July of 1991[2] is an addition to this existing structure in which Barona plans to offer various Class II card games under the same roof. Subject to the Board's approval, Barona is now preparing plans and specifications for the remodeling of a portion of the existing structure to accommodate simulcast wagering. At its early convenience, the Board will review the plans and specifications for the intended simulcast facility and will inspect the existing facility. If the Board finds that the plans for the simulcast facility comply with the substantive requirements of Title 4, Code of California Regulations, Article 24, Sections 2058(e) and (f), or the then applicable requirements for approving simulcast facilities, and the applicable building and construction codes, the Board shall approve the new Barona facility, provided that it is constructed in accordance with the approved plans and specifications, and in conformity with the applicable uniform codes.

Similarly, paragraph 9, p. 4, of that compact grants to the State the right of entry onto the Barona Indian Reservation not to inspect the entire gaming establishment, but only "for purposes of inspecting its simulcast facility . . . ". Regarding licensing of personnel, paragraph 14, p. 5, of the Barona compact requires "Every person employed *in the simulcast facility* on the Barona Indian Reservation required to be licensed pursuant to Section

else on the Tribes' respective reservations. The alleged activities which are the subject of the State's counterclaim all occur *outside* the simulcast enclosures, elsewhere on the Tribes' reservations. Thus, such activities (if they occur at all, and the Tribes deny they occur) occur *outside* the simulcast enclosures and thus beyond the reach of the compacts. Therefore, even if the language relied upon by the District Court constituted a waiver of Tribal sovereign immunity, that waiver was effective only for actions taken "under this Compact." The actions of which the State complains supposedly occur only outside the simulcast enclosures, and thus not "under this Compact." If the State wishes regulatory and other control for areas on the reservations but outside the simulcast enclosures, then the Tribes will be glad to discuss with the State the terms of such a second compact.

Second, it is well-settled that any waiver of Tribal sovereign immunity must be "express and unequivocal"[28], rather than implied or ambiguous. The Tribes must

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1481 of the Board's Rules" (emphasis added) to "hold a valid license issued by the Board", while those hundreds of employees working at the Barona Band's other gaming activities under the same roof are not similarly required to obtain State-issued licenses. More importantly, paragraph 16.a., p. 5, of the same compact extends the State's civil regulatory jurisdiction "specifically pertaining to the conduct of simulcast wagering" not to entire Barona Indian Reservation or to other parts of the gaming enterprise, but rather only to "the simulcast wagering facility established or operated by Barona on the Barona Indian Reservation".

[28] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Waivers of any sovereign's immunity must be strictly construed. *U.S. v. Nordic Village, Inc.*, ___ U.S. ___, ___; 112 S.Ct.

assert that, especially when viewed in light of the geographical limitation on the scope of the compacts, this

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1011, 1015 (1992); *U.S. Department of Energy v. Ohio*, ___ U.S. ___, ___; 112 S.Ct. 1627, 1633 (1992). Waivers of tribal sovereign immunity are also strictly construed because the sovereign immunity of tribes is coextensive with that of the United States. *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir., 1989). For example, the Eighth Circuit has held that a sue-and-be-sued clause in a tribal housing authority's charter waives its immunity for contract claims, but not for tort claims. *Rosebud Sioux Tribe v. Val-U Construction Co.*, 50 F.3d 560, 563 (8th Cir., 1995). See also *American Indian Agricultural Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-1380 (8th Cir., 1985) for a discussion of similar distinctions.

Any waiver provided by the Tribes in the above compact language extends only to: "judicial review of any action taken by either party *under this Compact*, or seeking any *interpretation of this Compact*" (emphasis added). The State's counterclaims relate to matters outside the scope of the compacts, as noted in fn. 24 above. In contrast, the counterclaims relate to other forms of gaming that occur, if at all, *outside* the scope of the present compacts because they occur, if at all, *outside* the simulcast facilities. Thus, the State's counterclaims do not arise "under this compact" and do not require any "interpretation of this Compact." For this reason, the compacts do not provide an unequivocal waiver of the Tribes' sovereign immunity as to the State's broad counterclaims regarding activities which occur, if at all, *outside* the simulcast facilities, and therefore *outside* the scope of the compacts.

In contrast, the Tribes' present narrow claims *do* arise under the compacts. Each Tribe seeks enforcement of the State's promise to pay to the respective Tribe the past and future license fees generated at the respective simulcast facilities, *as was specifically provided for in the express language of each compact*, and as this Court has held. The State's duty to make this payment is a direct *interpretation* of the specific and explicit language of the compacts for activities which do occur within the simulcast enclosures and therefore within the scope of the compacts. For

language does not meet the standard of "express and unequivocal" waiver. It could just as easily be viewed as no more than a venue provision.

C. The District Court properly dismissed the States' counterclaims for failure to state a claim upon which relief could be granted.

Although the District Court did not dismiss the States' counterclaims for lack of personal jurisdiction over the Tribes, it did dismiss those counterclaims for failure to state a claim, based on the following reasoning:

> The first counterclaim asks for a declaration that the tribes are violating the compacts be [sic] engaging in unauthorized gaming, and seeks an injunction against future violations. However, as explained above, the compacts contain no such implied promises [regarding gaming outside the simulcast enclosures] and to read them into the compacts would violate the policy and language of IGRA. Further the State's authority to seek injunctions under 25 U.S.C. §2710(d)(7)(A)(ii) is restricted to suit to enjoin class III gaming that is in violation of the terms of a tribal-state compact. The State therefore has no basis for seeking the requested injunctive relief and declaratory relief. The counterclaim must be dismissed as a matter of law.

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these reasons, the Tribes submit that, while their modest and narrow claims do fall within the scope of the waiver language of the compacts, the State's much broader and far-reaching counterclaims do not.

Memorandum of Opinion and Order, April 26, 1996, p. 16, lines 15-26

The District Court was certainly correct in this conclusion. The compacts contain no express promise by the Tribes as to what forms of gaming, if any, the Tribes will or will not engage in *outside the simulcast enclosures.* The State does not even claim there is any such language. Instead, the State would have the Court imply such a promise on which it could base a counterclaim.

But the bargaining process is not so easily circumvented. Had the State desired such an express promise, it could have negotiated for one, but did not do so. Implying such language into this compact where the parties did not negotiate it would also do violence to this Court's definitive interpretation of the critical jurisdictional provisions of section 23 of IGRA, 18 U.S.C. § 1166(d), in *Sycuan, Barona, and Viejas Bands of Mission Indians v. Roache,* 54 F.3d 535, 540 (9th Cir. 1995). Implying such a promise under these circumstances would circumvent this Court's holding in *Sycuan* by indirectly providing to the State the ability to regulate a tribe's gaming activities on its reservation in the absence of a compact so providing, when this Court has held in *Sycuan, supra,* that a compact is the *exclusive* means by which a state may acquire regulatory jurisdiction over gaming on any portion of a federal Indian reservation. As the District Court recognized in rejecting this argument when framed as an affirmative defense of unclean hands:

> In light of the strong federal policy to limit the reach of state authority over tribal affairs to matters specifically covered in the tribal-state compact, the State's unclean hands defense fails.

> Enforcement of IGRA's prohibition against class III gaming that is not covered by a compact is a matter solely within federal control where, as here, the compacts are silent on the subject. As with the claim of implied covenants discussed above, to allow the State to assert alleged illegal class III gaming as an equitable defense would be, in effect, to extend state regulatory authority over matters as to which Congress has denied the states jurisdiction except through the compact and the agreement of the tribes.
>
> Memorandum of Opinion and Order, April 26, 1996, p. 13, lines 2-13

For all three of the above reasons, the district Court [properly dismissed the State's counterclaims.

CONCLUSION

For the reasons stated above, the Tribes urge the Court to affirm the actions of the District Court as noted above, either on the grounds of the District Court or any grounds fairly presented by the Tribes or on this record, and to re-remand this case to the District Court with very specific directions for entry of judgment, with declaratory and injunctive relief, including actual payment of the accrued and future disputed funds, to the Tribes.

Dated: December 30, 1996

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth circuit [sic] Rule 32(e)(4), I, Art Bunce, hereby certify that the Brief of Plaintiff-Appellee Tribes in Appeal by State Defendants-Appellants is double-spaced (except for quotations and footnotes), proportionately spaced, with a typeface of 12 points, and contains 11,548 words.

Dated: December 30, 1996

/s/ Art Bunce
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PROOF OF SERVICE BY MAIL

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

On Appeal from the United States District Court
for the Eastern District of California
No. CIV-S-90-1118 DFL
The Honorable David E. Levi, Judge

REPLY BRIEF OF APPELLANT RACING ASSOCIATIONS (PROPOSED DEFENDANT INTERVENORS)

(Filed Jan. 14, 1997)

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INTRODUCTION

The tribes make much of the fact that this case is about money, as if the property interests of the racing associations, unlike the entrepreneurial commercial endeavors of the tribes, are unimportant to the resolution of this case. The tribes also contend that the disputed tax revenues would "make a difference" in the level of governmental services provided by the tribes. The racing associations do not contend that a recitation of such unsubstantiated facts are relevant to the outcome of this litigation, but, simply to respond to the tribes, will point out several additional facts which are equally true.

First, the racing associations, as corporate citizens of the United States, have asserted constitutionally protected rights. Moreover, under state law, the racing associations generate millions of dollars for non-profit charitable organizations.[1] In addition, the racing associations and other racing industry participants generate over $100 million in tax dollars for the benefit of both the State and local governments.[2]

In contrast, the Cabazon, Sycuan, Viejas, and Barona Bands of Mission Indians, with a combined population of just over 800 members,[3] are claiming $11 million dollars

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[1] See, California Business and Professions Code sections 19550-19557.

[2] See, *Statistical Report of Operations for the Year 1995* (California Horse Racing Board). (Charity Day distributions for 1995 – $1.6 million; total license fees paid to the State by the racing industry – $106 million.)

[3] Hereinafter collectively referred to as the "tribes." Cabazon Band, 25 members; Sycuan Band, 120 members; Viejas

in racing association revenues, and have generated untold millions of dollars from Class III gambling operations conducted without a compact since 1992.[4]

The tribes oppose intervention of the racing associations in this matter, not on substantive grounds, which they refuse to even address, but rather because the racing associations awaited the outcome of the dispute over the tribes' claim that the State was unlawfully taxing the tribes before seeking intervention. As explained more fully herein, the racing association interests are legally and substantively significant and their intervention is fully consistent with the requirements for intervention set forth in the Rules of Civil Procedure. Accordingly, the racing associations urge this Court to grant this appeal.

ARGUMENT

I. THE MEASURE OF WHETHER THE MOTION TO INTERVENE WAS TIMELY MUST BE TAKEN FROM THE DATE THE TRIBES CLAIMED ENTITLEMENT TO TAX REVENUES IMPOSED ON THE RACING ASSOCIATIONS, AND NOT FROM THE INCEPTION OF THIS MATTER, WHICH CONCERNED ONLY WHETHER THE STATE WAS IMPROPERLY TAXING THE TRIBES.

The District Court's summary denial of the racing associations' motion to intervene was based solely on

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Band, 213 members; Barona Band, 450 members. (*Tribal Information and Directory*, Sept. 1995, Bureau of Indian Affairs.)

[4] See this Court's opinions in *Rumsey Band of Wintun Indian v. State of California, et al.*, 64 F.3d 1250 (9th Cir. 1994) and *United States v. EC Investments*, 77 F.3d 327 (9th Cir. 1996).

timeliness. The lower court made no findings with respect to the timeliness issue other than to hold that "the motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation."[5] Under the law in the circuit, the district court's denial of the intervention motion on timeliness grounds is reviewed for abuse of discretion.[6]

The three criteria for determining whether a motion to intervene is timely are also set out in the *McGough* case and are to be construed broadly in support of intervention.[7] They are: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for any length of the delay. The only ground cited by the District Court was the first, i.e, that the motion was filed too late in the proceedings.

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[5] Excerpt of Record ("ER") 20-21.

[6] *U.S., ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391 (9th Cir. 1992). In their opening brief, the racing associations noted that review of a motion to intervene as of right is reviewed de novo by the appellate court. (Brief, pp. 14-15; *United States v. Oregon*, 839 F.2d 637 (9th Cir. 1988).) Although the assertion is correct, the question of the *timeliness* of a motion to intervene is reviewed for abuse of discretion. (*McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1393-1394 (9th Cir. 1992).) The arguments raised by the racing associations concerning the District Court's error in denying the intervention motion establish that the trial court abused its discretion in issuing the denial, but the actual standard of review was not acknowledged in that brief. The racing associations regret any inconvenience to the court in failing to specifically note this additional standard and seek to set the record straight by this further reference.

[7] *Id.* at 1394.

Notwithstanding the fact that the District Court relied solely on the first ground, the racing associations have established that no prejudice will be suffered by the other parties if the racing associations' motion to intervene is granted. In addition, the record demonstrates that the length of delay in filing the motion was both relatively short and adequately explained. Moreover, given the extreme prejudice that will be suffered by the racing associations if they are not permitted to intervene, equitable considerations clearly militate in favor of granting the motion.

As fully explained in the opening brief, the racing associations had no reason to intervene in a matter between the State of California and the tribes concerning the issue whether the State was improperly taxing the *tribes*, which was the only basis for the tribes' initial declaratory relief action against the State. The interests of the racing associations were not implicated until after remand of this Court's first opinion in this matter. The arguments raised by the tribes in their opposition to this appeal do not overcome this basic point.

For example, the tribes argue that the racing associations have known since 1990 that the tribes and the State "were litigating the question of whether the tribes or the State was entitled to the disputed license fee funds . . . " and that the racing associations should have asserted their interest at that time.[8] This argument is patently disingenuous and misleading because it rests on the generality of the allegation. It is the *specific* dispute now at

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[8] Tribes' Brief, p. 12.

issue – whether the State of California has agreed, or can be compelled, to tax the racing associations for the benefit of the tribes – and not the mere existence of *any* dispute between the tribes and the State that determines when and if the racing associations had the requisite legal interest to support intervention.

The tribes also argue that paragraph 5(b) of the operating agreements between SCOTWINC, acting as agent for the racing associations, and the tribes is evidence that the racing associations were aware of the dispute between the tribes and the State and could have protected themselves in such agreements as to any claim they might have to the monies in dispute. This argument is also without merit and ignores the fact that, when the operating agreements were signed, the only dispute between the State and the tribes was the dispute over the lawfulness of the tax which the tribes claimed was imposed on them.[9]

As the State demonstrated in its opening brief, the question posed by the original declaratory relief actions filed in 1990, and decided by this court in the first appeal in this matter, was whether the State was improperly taxing the *tribes*.[10] The racing associations therefore had no direct interest at stake in the litigation, and had no reason to intervene. That dispute, which was resolved by

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[9] As noted in the declaration of Cathy Christian attached to the Emergency Motion for Stay filed by the racing associations with this Court on July 30, 1996, the last operating agreement between SCOTWINC and the tribes expired at the end of 1994. Since that date, no operating agreement has been signed.

[10] State Brief, pp. 23-24.

this Court in its first opinion, is the only dispute which the racing associations acknowledged in their operating agreements.

Indeed, the terms of the compacts themselves belie the tribes' assertions. The racing associations were aware that a determination of the *lawfulness* of the tax must precede any determination of *distribution* of that tax. This is manifested by the fact that the terms of the compacts, set forth in Paragraph 19(b), require a finding whether the state tax was impermissible *prior* to determination of whether the tax should either be retained by the State (paragraph 19(b)(2)) or refunded to the tribes (paragraph 19(b)(3)).[11] Thus, it is simply not true that the operating agreements demonstrate that the racing associations were aware of the possible effect of this litigation on their interests.[12]

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[11] See, Clerk's Record ("CR") 74: p. 3, n.1.

[12] The tribes ask this Court to take judicial notice of the operating agreement between the Sycuan Band of Mission Indians and the State which expired in 1991. (Tribes' Brief, pp. 16-17.) Although the racing associations acknowledge the existence of a now-expired agreement, they vigorously contest the legal significance of that agreement with respect to the timeliness of the motion to intervene. (See, e.g., Declaration of Cathy Christian attached to the racing associations' Motion for Emergency Stay filed with this Court on July 30, 1996.) Rule 201 of the Federal Rules of Evidence permit this Court to take judicial notice of appropriate facts, but permits an objecting party an opportunity to be heard prior to such action. The appellant racing associations request an opportunity to object to judicial notice of the 1991 operating agreement for the purpose of establishing notice as of that date of the need to protect their interests in this litigation.

Arguably, the interests of the racing associations arose when this Court held that the license fee, *while not a tax on the tribes*, was nonetheless preempted. This Court reasoned that the imposition of the license fee *on the racing associations* was preempted by federal law. The conflict between the State's collection of a license fee from the racing associations and federal law was identified in the first opinion as an interference with the "primary beneficiary" requirement of IGRA[13] that tribes receive the greatest monetary benefit from gambling on their lands. Although technically unnecessary to the holding, this Court further held that the state tax imposed a "burden" on the tribes because of a "right" they acquired by virtue of those procedural provisions of the compact which refunded the license fee to the tribes if they prevailed in the litigation.[14] Thus, this Court decided the matter on substantively different grounds than those raised by the tribes and addressed by the District Court and briefed by the State and the tribes and, for the first time raised the possibility that the compact would be interpreted as an agreement to tax the *racing associations* but give the tax proceeds to the tribes.

While the tribes argue that the racing associations should have sought intervention at the time that this Court's earlier decision was rendered, the most charitable characterization of that assertion that can be made is that it is offered tongue in cheek. Certainly the tribes have

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[13] Indian Gaming Regulatory Act, 25 U.S.C. section 2701, et seq.

[14] *Cabazon Band of Mission Indians v. Wilson, et al.*, 37 F.3d 430, 433-435 (9th Cir. 1994.)

cited no case authority where intervention was permitted by the Court of Appeals after issuance of a decision and prior to the issuance of a remittitur. Moreover, it is arguable that the result of this Court's holding on remand would be that because the State could no longer impose its (now lawful) license fee on the racing associations, the tax simply would not be paid to the State.

The real issue in this appeal is whether the racing associations should have sought intervention at the moment the tribes filed amended complaints and the State argued that, under the theory of recovery in those complaints, the racing associations must be named as indispensable parties. Certainly the racing associations could reasonably believe that the State was advancing their interests at that point in this litigation. Moreover, the reasons for the delay in seeking intervention are eminently reasonable: a thorough review of the options open to the racing associations to best protect their statutorily-granted interest in all racing proceeds not otherwise distributed by the California Legislature in the applicable sections of the Business and Professions Code.[15] Moreover, the actual time which passed between the State's filing of its first amended answers (11/21/96; CR 98) and the racing associations' motion to intervene (7/3/96; CR 125) is not measured in years but in months: seven months.

While the tribes complain of the delay, they do not offer any argument why intervention would have prejudiced their interests or unduly delayed the proceedings

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[15] Opening Brief, p. 21.

before the trial court. The issue raised by the racing associations was, and is, solely one of law, which could have been addressed by the District Court at the same time it addressed the State's motion for reconsideration.

On the other hand, the denial of the motion to intervene is catastrophic for the racing associations. Only in this litigation is there an opportunity for the racing associations to raise their claim that, because this Court rejected the tribes' argument that they were taxed by the State, the compact does not entitle the tribes to the fee. Unless the racing associations are permitted to intervene in this case, their claim to approximately $11 million paid to the State in taxes from the proceeds of past simulcast revenues, as well as their right to future simulcast revenues, will be forfeited without an opportunity to be heard.

Finally, the State did not seek reconsideration of the District Court's rejection of the State's indispensable party affirmative defense, an act which is obviously not consistent with representing the interests of the racing associations. Moreover, one of the States' arguments concerning the continuing validity of the compacts is that its inability to tax the racing associations for the benefit of the tribes was never part of the agreement reached with the tribes.[16] As a result, the State asserts that the compact is no longer valid, at least to the extent that paragraph 19 may affect the distribution of the license fees. Thus, understandably, the State recognizes that, if the compacts remain in effect, the funds should remain with the racing

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[16] State's Brief, pp. 28-35.

industry participants, but the State has not yet surrendered its claim to the taxed monies.

In short, the interests of the racing associations are totally unrepresented in this appeal by any party. Given the significant nature of the interest claimed by the racing associations and the fact that only issues of law would be raised by their intervention, neither the tribes nor the State would be prejudiced if intervention were granted.

II. THE RACING ASSOCIATIONS HAVE A SIGNIFICANT LEGAL INTEREST IN THE UNLAWFUL TAKING OF THEIR PROPERTY IF THE COMPACT IS INTERPRETED TO REQUIRE STATE TAXATION OF SATELLITE WAGERING PROCEEDS FOR THE BENEFIT OF THE TRIBES.

The tribes also argue that, even if the racing associations have a statutorily-granted interest in the satellite wagering revenues under state law, they have no enforceable legal interest in the license fees because the "compact supersedes state law." The tribes rely on language in this Court's earlier opinion, and argue that the State agreed to modifications of state law in the compact. The tribes then argue that the State intended for the compact, rather than state law, to govern satellite wagering on Indian lands.[17] The tribes' assertion fails for three distinct reasons: (1) the tribes ignore the fact that they expressly agreed, in the compacts, that state law would govern

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[17] Tribes' Brief, pp. 21-24.

satellite wagering operations and (2) they rely on language in this Court's earlier opinion which was unnecessary to the holding in the case and which, in any event, has significance only for the limited purpose of establishing the preemptive effect of federal law over any state taxation of satellite wagering proceeds, at least to the extent that the tribe is not the "primary beneficiary"; and (3) enforcement by a federal court of a compact interpreted to require taxation of private entities such as the racing associations for the benefit of the tribes is prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

First, the tribes agreed to the extension of the State Horse Racing Law[18] on their lands to govern the operation of satellite wagering. Paragraph 16 of each of the tribal-state compacts *expressly* provides that State statutory and constitutional law governs satellite wagering operations on the tribes' lands, except to the extent modified by the compact or in conflict with federal law.[19] Thus, with respect to the distribution of satellite wagering proceeds to the *racing associations*, the tribes expressly acknowledge that state law will control. Additionally, in paragraph 19(a) of the compacts, the tribes acknowledge that the "amounts deducted from parimutuel wagers at the [tribal] simulcast wagering facility, *and the distribution of such amounts*, shall be the same as that provided for

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[18] California Business and Professions Code secs. 19400, et seq.

[19] CR 19; Cabazon and Sycuan Compacts, ¶ 16.

under state law for simulcast wagering facilities, other than fairs, in the southern zone."[20]

Moreover, even if paragraph 16's incorporation of state law is modified by *federal law*, nothing in paragraph 16 suggests that federal preemption of state taxation of the *racing associations* results in the tribes' right to those funds. Indeed, it is noteworthy that the tribes never filed suit against the racing associations to establish that the tribes were entitled to racing association revenues taxed by the State. Such a suit might have been short-lived, given the tribes' express agreement in paragraph 19(a) of the compacts to the distributions to the racing industry found in California Business and Professions Code section 19605.8.[21] Thus, the tribes cannot persuasively argue that the compact terms defeat the racing associations' legal entitlement to the taxed revenues.

Second, the tribes rely on dicta in this Court's earlier opinion to support their claim that the compact entitles them to the racing industry's revenues. With all due respect, the racing associations assert that this Court's initial opinion rests solely on the determination that IGRA precludes state taxation of the racing associations because that law requires the tribes, not the State, to be

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[20] CR 19; ¶ 19(a) of the Sycuan and Cabazon compacts (emphasis added).

[21] In 1991, the California Legislature caused a renumbering of the code sections in the Horse Racing Law. Thus, the specific statutory references found in some of the compacts which were signed prior to that date are now found in the renumbered sections.

the "primary beneficiary" of the satellite wagering operation. Although the earlier opinion finds a tribal "right" to the license fee in paragraph 19(b)(3) of the compact, the significance of that holding must be limited to the preemption analysis.

The tribes' right to *enforce* the compacts in the manner they assert is required by the compacts' terms, and any State or racing association defenses thereto, necessarily was never before this court. This is because the only issue raised by the declaratory relief action was the lawfulness of the tax, not the consequences which followed from a determination that the tax was unlawful. The significance of this Court's decision was therefore solely to invalidate the tax. The question of how racing association revenues were subsequently to be distributed, if at all, by the terms of the compact required the tribes to make a claim under the compact. Such claim was subject to the State's possible defenses, and, most importantly for the purposes of this appeal, should have required the tribes to name the racing associations as indispensable parties.[22]

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[22] In its April 26, 1996 memorandum opinion, the District Court struck the State's affirmative defenses under Rule 19(a) of the Federal Rules of Civil Procedure. The trial court struck the defense under Rule 19(a)(1) because it found that the [sic] both the tribes and the racing associations could protect their interests by collecting the state license fee from the State. (ER 13-14.) Even setting aside the legal questions raised by subjecting the State to double liability, any state law claim filed by the racing associations for the tax revenues might ultimately be defeated by the sovereign immunity of the tribes or rendered a practical impossibility by the Legislature's refusal to appropriate the necessary funds to pay the judgment. (CITE.)

An additional reason for limiting the significance of this Court's holding that "the compact supersedes state law" to the preemption analysis and declining to accept the tribes' argument that the holding represents an enforcement of the compact itself is because this Court was never asked to resolve a conflict between the compact and state law, but rather to determine, as a matter of *federal law*, whether the State's imposition of the license fee was an improper tax on the tribes. As a matter of federal law, this Court found that the fee was not an improper tax on the tribes, but rather an improper tax on the *racing associations*. Thus, until these appeals, this

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The District Court also struck the affirmative defense under Rule 19(a)(2) on the grounds that the racing associations had not claimed any interest in the litigation. (ER 14.) As explained herein, the racing associations' reluctance to affirmatively seek to join this litigation was fully explained by the State's assertion of their indispensable party status and the fact that the legal issues on remand were significantly different than those presented by the tribes' initial actions for declaratory relief. Moreover, the case authority cited by the District Court for the proposition that an indispensable party defense can be defeated by the third party's lack of interest in the litigation is inapposite. (See, *DeWit v. Firstar Corp.*, 879 F.Supp. 947, 995 (N.D. Iowa 1995) [Third parties are not "indispensable" under Rule 19(b), thus requiring dismissal for failure to join, because they are not "necessary" parties under Rule 19(a), due to third parties' express abandonment of claim to property at issue or failure to assert an interest.].) Here, as admitted by the tribes, SCOTWINC, on behalf of the racing industry participants, advised the tribes at the end of 1994 that, should the tribes claim an interest in *racing revenues* taxed by the State, they would object. (See, Exhibits B and C to Cabazon and Sycuan Bands' July 31, 1996, Memorandum in Opposition to the racing associations' motion to this Court for emergency stay.)

Court has never been asked to consider whether the State breached its compact obligations by refusing to pay revenues obtained from the racing associations to the tribes.

Finally, the racing associations note that the State has objected to the jurisdiction of the federal courts to enforce what the State characterizes as a political agreement, i.e., the negotiated tribal-state compact. Even if the compact is viewed as a statement of federal law, in that after it is negotiated it is approved by the Secretary of the Interior and published in the federal register and therefore "enforceable" the same as any Congressional enactment, as interpreted by the District Court it must be struck down as unconstitutional.

The District Court adopted the tribes' reasoning that the compact anticipated *any* basis under which State collection of the license fee might be ruled unlawful and therefore ordered the State to pay to the tribes revenue derived from taxation of the racing associations.[23] The District Court previously held that the compact was implicitly enforceable in federal court because

> " . . . IGRA expressly authorizes a compact to include remedies for breach of compact, and because IGRA's grant of jurisdiction to require good faith bargaining would be pointless were there no jurisdiction to enforce the compact . . . "[24]

Thus, the District Court based jurisdiction on its ability to enforce a Congressional enactment.

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[23] ER 17-18.

[24] CR 74: pp. 8-9.

Congress, however, has no power to enact legislation requiring state taxation of a person for any reason, much less using taxing power to deprive a person of their property for the benefit of another. Simply stated, neither IGRA itself nor a tribal-state compact negotiated thereunder can be construed to create a right in the tribes to the property of third parties. Such an interpretation would be unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. The State simply cannot confer on the tribes, even under the compulsion of IGRA or a tribal-state compact, such a right and a federal court has no power to enforce such a taxing arrangement between a State and a tribe by construing the arrangement as inherent in a Congressional enactment such as IGRA.

At the risk of engaging in dramatic speech, the racing associations point out that similar taxation without representation was the spark that led to the American Revolution and is an anathema to our system of government. Indeed, it can be argued that the United States Constitution, in guaranteeing to the States a republican form of government, protects against the legislative efforts of the State and a tribe to the deprivation of property rights of other persons.[25]

For each of these reasons, the racing associations have established a significant legal interest in these proceedings which justifies their intervention in these proceedings.[26]

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[25] United States Constitution, Article IV, section 4.

[26] The tribes claim an additional ground for affirmance of the District Court's denial of the motion to intervene by arguing

CONCLUSION

For each of the above reasons, appellant racing associations, the proposed defendant-intervenors in this matter, request that an order be entered reversing the District Court and granting the motion to intervene. In addition, appellant racing associations urge this Court to reverse the order of the District Court requiring the State of California to pay to the tribes any funds derived from the State's taxation of racing association revenues derived from satellite wagers placed at the facilities of the plaintiff Indian tribes.

DATED: January 13, 1997

Respectfully Submitted,

Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP

By: /s/ Cathy Christian
CATHY CHRISTIAN
Attorneys for Proposed
Defendant Intervenors/
Appellants

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that the racing associations violated Local Rule 142(e) of the Eastern District of California requiring an affidavit of counsel demonstrating a need for an order shortening time and the reason for failure to obtain a stipulation for such an order from the other parties. (Tribes' Brief, p. 24, n. 20.) The District Court did not rely on Rule 142(e); in any event, counsel for the racing associations fully complied with the rule's provisions by submitting declarations establishing that the tribes' counsel refused to stipulate to the shortened time request and that the request was based on the desire to have the racing associations' motion heard on the same date as the State's motion for reconsideration. (CR 126 [Ex Parte Application of Proposed Defendant-Intervenors for Order Shortening Time, filed 7/3/96]; 127; 129.)

CERTIFICATE OF COMPLIANCE

The accompanying reply brief of appellants and proposed intervenor-defendant racing associations was prepared using a proportionately spaced typeface (Times Roman) and was created with 14-point type. The brief is double-spaced and contains 4,542 words.

DATED: January 13, 1997

Respectfully Submitted,

Nielsen, Merksamer,
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By: /s/ Cathy Christian
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ADDENDUM

RELEVANT STATUTES

California Business and Profession Code

§ 19400. Citation of chapter

This chapter is known and may be cited as the "Horse Racing Law."

§ 19550. Number required

The board shall require each licensed racing association which conducts 14 or less weeks of racing to designate three racing days, and each licensed racing association which conducts more than 14 weeks of racing to designate five racing days during any one meeting, to be conducted as charity days by such licensee for the purpose of distribution of the net proceeds therefrom as hereinafter defined to beneficiaries through the distributing agent, as provided herein.

For the purposes of this section, a split meeting shall be considered a single meeting and shall designate the appropriate number of charity days based on the total weeks of racing allocated for both periods of the meeting.

This section shall not apply to the California Exposition and State Fair or a county or district agricultural association fair.

§ 19551. Conduct of charity day racing as condition of license

As a condition of the issuance of the license, the board shall require that the licensee of such meeting shall conduct such charity day racing and shall furnish its plant,

facilities and all personnel and property necessary for the conduct of racing on the charity days.

§ 19552. Service and compensation of racing officials

All racing officials required by law or regulation to serve in connection with the meeting shall also serve, without further authority or designation, in their respective capacities and at the same rate of compensation in connection with the charity day racing.

§ 19553. Disposition of net proceeds; What constitutes income; Deduction of expenses; Payment of balance to distributing agent; Prohibition against making profit

On such charity days the income from all operations carried on in connection with or resulting from the conduct of racing on such days, including income from parimutuel wagering, admissions, parking, program sales and concessions shall be income from operations on such charity days.

From the gross income from such operations on charity days there shall be deducted only the expenses incurred because of the conduct of racing on such days, but no deduction shall be made by the licensee for any overhead expenses or for expenses of the licensee which would be incurred irrespective of the conduct of the charity days racing.

The balance of such income after such deductions is herein designated as charity days' net proceeds and shall be paid by such licensee to a distributing agent selected

and qualified in accordance with this article. No profit shall be made, either directly or indirectly, from such charity days' operations by the licensee of the meeting.

§ 19554. Distributing agent; Qualifications; Membership; Bylaws, vacancies, and annual meeting

The distributing agent for such charity days' net proceeds shall always be a nonprofit organization or corporation, or nonprofit organizations or corporations, selected by the licensee of the meeting and approved by the board.

(a) Each such distributing agent to be qualified hereunder must conform to the then existing laws and regulations of this State and the United States, so as to be exempt or be entitled to exemption from the payment of any tax measured by income.

(b) It shall have not less than five trustees or directors. None of the individuals constituting the governing board of trustees or directors of such distributing agent shall be directly connected with, be a stockholder, or have any interest in the racing association which is the licensee of the race meeting. Each of such individual trustees or directors shall be a person who is at the time (1) a resident of this State, and (2) an executive, officer, director, trustee, or member of the governing body or board, by whatever name such governing body or board may be known, of an organization engaged in civic, religious, charitable, educational or veteran activities in this State.

(c) Each distributing agent shall adopt bylaws, shall provide for election to fill vacancies in the board of directors or trustees, and shall hold at least one meeting each year.

§ 19555. Payment to distributing agent; Distribution to beneficiaries

Each licensee shall pay over such charity days' net proceeds to such distributing agent as soon as practicable after the determination thereof, and such agent or agents shall hereafter distribute not less than 90 percent of the aggregate proceeds from charity days' racing received available for distribution by it to beneficiaries within 12 calendar months after the last day of the meeting during which such charity days were conducted. The balance, if any, of such aggregate charity days' net proceeds not distributed within such 12-month period shall be distributed as soon thereafter as is practicable.

§ 19556. Disposition of net proceeds; Qualified beneficiaries; Effect of charities in connection with race horses

The distribution shall be made by the distributing agent to beneficiaries qualified under this article. For the purposes of this article, a beneficiary shall be:

(a) A nonprofit corporation or organization entitled by law to receive a distribution made by a distributing agent.

(b) Exempt or entitled to an exemption from the same taxes measured by income imposed by this state and the United States as those under which the distributing agent is exempt or entitled to an exemption.

(c) Engaged in charitable, benevolent, civil, religious, educational, or veterans' work similar to that of agencies recognized by an organized community chest in the State

of California, except that the funds so distributed may be used by the beneficiary for capital expenditures.

(d) Approved by the board.

No beneficiary otherwise qualified under this section to receive charity day net proceeds shall be excluded on the basis that the beneficiary provides charitable benefits to persons connected with the care, training, and running of racehorses, except that type of beneficiary shall make an accounting to the board within one calendar year of the date of receipt of any distribution.

§ 19557. Approval prerequisite to payment to beneficiary

Within the 12-month period specified in Section 19555, and prior to the payment of any charity days' net proceeds to any beneficiary, the distributing agent shall submit the name of the beneficiary to the board for the board's approval.

If the board does not disapprove of the beneficiary within 60 days after the submission, its approval shall be deemed to have been given.

§ 19605.8. Distribution of remaining funds from thoroughbred meetings

For thoroughbred meetings, the funds remaining after distribution of the amounts set forth in Sections 19605.7

and 19605.71 shall be distributed 50 percent as commissions to the association which conducts the racing meeting and 50 percent as purses to the horsemen participating in the racing meeting.

Federal Civil Judicial Procedure Rules

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. §§ 1013a, 2015.5)

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 770 L Street, Suite 800, Sacramento, California 95814.

On January 13, 1997, I served the foregoing **REPLY BRIEF** on the parties in said action by enclosing a true copy thereof in an envelope and placing the envelope for collection and mailing on the date and at the place set forth above following our ordinary business practices, addressed as follows:

PLEASE SEE ATTACHED LIST

I am readily familiar with this firm's practice for collecting and processing envelopes for mailing. On the same day that envelopes are placed for collection and mailing, they are deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 13, 1997, at Sacramento, California.

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IN THE UNTIED [sic] STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Of Petitioners Southern California Off-Track Wagering, Inc. (SCOTWINC), Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and the Los Angeles County Fair

(Proposed Defendant Intervenors)

(Filed Sep. 17, 1997)

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IN THE UNTIED [sic] STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON BAND OF MISSION INDIANS, et al., Plaintiffs-Appellees, **vs.** **PETE WILSON, et al.** Defendants-Appellants.	Nos. 96-16432, 96-16443

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Pursuant to the provisions of Rules 35 and 40 of the Federal Rules of Appellate Procedure (and Circuit Rules 35-1 and 40-1), petitioners, Southern California Off-Track Wagering, Inc. (SCOTWINC), Del Mar Thoroughbred Club, Hollywood Park, Inc., Los Angeles Turf Club, Oak Tree Racing Association, Los Alamitos Race Course and the Los Angeles County Fair, who are the proposed defendant-intervenors herein, respectfully petition the judges of this Court for a rehearing of the appeal in the above-entitled cause and respectfully suggest that this cause is appropriate for rehearing by all the judges of this Court convened en banc.

INTRODUCTION

In its second decision in this matter, this Court held that "despite its long and convoluted history, this case

begins and ends with four Tribal-State compacts." (Slip Opn., p. 11037.) In its analysis of those compacts, this Court determined that the State of California and the four Indian tribes who brought suit herein agreed to submit to the federal courts the broad question of whether the statutorily-mandated state license fee imposed *on California racetracks and horse owners*[1] for revenue generated at off-track wagering facilities on Indian lands was permissible under the Indian Gaming Regulatory Act ("IGRA").[2] As explained by both the State and the racing industry in their briefs to this Court, the question submitted to the district court was never whether the State's tax on the racing industry was unlawful *per se*, but rather whether the State was unlawfully taxing the tribes, either directly or indirectly because the tax on the racing industry economically burdened the tribes.

Under well-established principles of federal law, if a tax on a third party imposes an economic burden on an Indian tribe, the tax will be struck down. The result is that the third party *no longer will be taxed*, thus avoiding passing the burden of the tax on to the tribe.[3]

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[1] Petitioners will be interchangeably referenced herein as either the "racing industry", "racing industry participants" or "racetracks and horse owners". This is a more comprehensive and accurate description of the various petitioners than merely "racing associations" which was used previously.

[2] 25 U.S.C. section 2701, et seq. The state license fee against the revenues of the racetracks and horsemen is imposed pursuant to California Business and Professions Code sections 19605.7 and 19605.71.

[3] In *Crow Tribe of Indians, et al. v. State of Montana*, 92 F.2d 826 (9th Cir. 1996), this Court noted that taxes collected from a

This explains why the racing industry participants did not seek to intervene in this litigation. It was not until this matter was remanded, and the district court held, for the first time, that the *compacts* required continued taxation of the racing industry for the benefit of the Indian tribes that the racing industry's interests were directly impacted. Nonetheless, this Court determined that direct taxation of the racing industry was always the dispute submitted to the court by the parties and faulted the racetracks and horse owners for failing to assert their interest sooner.

Moreover, this Court's various opinions, each different from the other, but all finding a rationale to give the tax revenues to the tribes, fail to even acknowledge the most simple and logical explanation for the language in Paragraph 19(b) of the Compacts which provides for distribution of the tax in the event it is found unlawful. That explanation is: the State never agreed to continue imposing an unlawful tax on the racing industry for the benefit

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third party (and held in a court registry) were returned to the tribe because of an earlier decision which held that the tribe *suffered an actual economic burden* in that the value of the tribe's coal leases was reduced by the amount of Montana's severance tax. Such is manifestly not the case here, where no court has found that the tribes have been economically burdened by the tax. Rather, this Court has found that California *agreed* to tax the racing industry for the benefit of the tribes. Because, as explained herein, California has no authority to tax the racing industry for this purpose, the result of finding that the tax was invalid should be to simply return the tax money to the racing participants and to cease collecting it. There is no basis for this Court's unprecedented decision granting the tribes an unearned windfall based on the earnings of racetracks and horse owners.

of the tribes. Rather, assuming the tax was determined to be an unlawful tax on the tribes, the State and the tribes merely devised a *mechanism* for refunding those funds.

A perusal of the California Horse Racing Law[4] establishes that all the money wagered at an Indian facility (or *any* off track facility) is never handled by the tribe, but rather is collected and *distributed* by the race tracks.[5] Thus, if the tax was an unlawful burden on the tribe, the only practical way to return it was to get it back from the racing associations so that it could be refunded to the tribe. That is the *sole* interpretation of Paragraph 19(b) which explains the actions of the parties. The interpretation given by the Court, viz., that the State agreed to continue collecting an unlawful tax on the racing industry, produces strained and incredible results.

Even granting, for the sake of argument, that the State agreed to tax racetracks and horse owners and turn over those tax revenues to the tribes, and further assuming that petitioners might have expressed their interest in this litigation at an earlier date, the racing industry asserts that it is a clear abuse of discretion to deny intervention where, as here, the Court's interpretation of the State's agreement with the Indian tribes unconstitutionally deprives the racing industry of their property.

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[4] California Business and Professions Code Section 19400, et seq.

[5] See, e.g. California Business and Professions Code Sections 19605.3 (all off track wagers must be combined with on track parimutuel pool); 19606.1 (the racetracks must deposit all license fees into a special account in the State's General Fund.)

I. THIS COURT MISTAKENLY DETERMINED THAT THE RACING INDUSTRY SHOULD HAVE INTERVENED EARLIER IN THIS MATTER BECAUSE TAXATION OF THEIR REVENUES FOR THE BENEFIT OF INDIAN TRIBES WAS ALWAYS THE QUESTION TO BE DETERMINED IN THIS LITIGATION.

In its most recent decision in this matter, this Court held that "[f]rom the inception of this litigation, it was clear that the license fees at issue in this case are paid by the racing associations."[6] As a result, this Court held that the racing industry's intervention motion, which was not filed until the district court, on remand, ordered the fees paid to the Indian tribes, was untimely. The petitioning racetracks and horse owners respectfully assert, however, that neither the district court's first decision, nor this Court's earlier opinion (labeled in the slip opinion herein as "Cabazon II") support this view.

In the district court's first opinion,[7] the court noted that:

> "While negotiating the compacts, the parties disagreed about whether California has jurisdiction to collect its license fee based on revenues generated at the Tribes' simulcast operations. As noted above, such fees are collected by law from the racing associations, based on wagering revenues – including simulcast wagers – generated by the associations' races. (Citations omitted.) . . . *The Tribes argue that the license fees are impermissible because they reduce the amount that*

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[6] Slip Opinion, p. 11053.

[7] *Cabazon Band of Mission Indians, et al. v. State of California*, 788 F.Supp. 1513 (1992).

> *the Tribes would collect from the simulcast enterprise, and so constitute a direct tax.* (Footnote omitted.) California asserts that because the license fees are paid by the racing associations, the racing associations are the entities burdened by the tax, not the Tribes. The Tribes and California agreed that the Tribes would seek judicial resolution of this question, which is the sole issue before this Court." (Emphasis added.)[8]

Obviously, the question considered by the district court (because it was the question submitted by the parties) was whether the fees were an impermissible tax *on the tribes*. Indeed, the Indian tribes submitted declarations purporting to establish that the state license fee was a tax on the tribes.[9] The district court rejected the assertion that the state license fee was a direct tax on the tribes and further considered the contention that the tax was an impermissible indirect tax on the tribes, framing the question as follows:

> "The dispute in the present case is over whether the license fees, which are levied on the racing associations and which affect the Tribes only indirectly, *are an impermissible burden on the Tribes.*" (Emphasis added.)[10]

The district court then held that neither IGRA nor general principles of federal Indian law, which consider the scope of tribal sovereignty, preclude state taxation of

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[8] *Id.* at p. 1516.

[9] See Declaration of John James, filed with the Cabazon tribe's Motion for Summary Judgment.

[10] *Cabazon Band of Mission Indians, et al. v. State of California*, 788 F.Supp. 1513, 1516, *supra*.

the racing industry as an indirect tax on the tribes. The district court found that the tax imposed no economic burden on the tribes and rejected as "circular" the tribes' suggestion that the tribal-state compact, which provides that *if the tax is found unlawful*, the tax will be refunded, was itself an economic burden constituting an unlawful tax.[11]

Thus, given that the State and the tribes were only litigating the question of whether the tax imposed a burden on the *tribes*, and that the district court concluded that no such burden existed, it cannot be said that the racing industry was remiss in not moving to intervene.

This Court's decision in *Cabazon II*[12] similarly does not establish the need for immediate intervention by the racing industry. At best, it can be said that this Court's earlier decision found that the tribal-state compacts constitute an economic burden on the tribes because they establish a tribal "right" to those tax revenues which are in excess of the amount earned by the tribe. *Cabazon II's* preemption analysis rested on the theory that the State could not earn *more* than an Indian tribe for gambling activity on Indian lands because the tribe would not be the "primary beneficiary" of the activity. Thus, although the tribes and the State might have re-negotiated their compact so that the State did not earn more than the tribes, nothing in *Cabazon II* suggested that the tax on the racing industry for wagers placed on tribal lands should be turned over to the tribes.

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[11] *Id.*, at pp. 1517.

[12] *Cabazon Band of Mission Indians, et al. v. Wilson*, 37 F.3d 430 (9th Cir. 1994).

On remand, moreover, the State of California argued that *Cabazon II* resulted in voiding the compacts, because others benefitted more from the conduct of off-track betting on Indian lands than did the tribes. Although the racing industry might have moved to intervene at the initial stages of the remand, it was not until the tribes filed amended complaints and the State argued that the racing industry was an indispensable party that it can be stated with any certainty that the racing industry was on notice that its interests were endangered. However, the actual time which passed between the State's filing of its first amended answers (11/21/96; Clerk's Record 98) and the racing industry's motion to intervene (7/3/96; Clerk's Record 125) was a mere seven months. As explained below, given the constitutional dimension of this Court's holding that the State and the Indian tribes *agreed* to deprive the racing industry of a portion of its revenue, solely to benefit the tribes, the delay – in a case which had already spanned five years – should not be fatal. Nor have the State or the tribes established *any* prejudice as a result of the racing industry's intervention in this matter.

II. EVEN IF THE STATE AND THE INDIAN TRIBES AGREED TO TAX THE RACING ASSOCIATIONS FOR THE BENEFIT OF THE TRIBES, SUCH AN AGREEMENT IS [sic] SERVES NO PUBLIC PURPOSE. ACCORDINGLY, THE COURT SHOULD HAVE PERMITTED THE RACING INDUSTRY PARTICIPANTS TO INTERVENE AND ASSERT THEIR CONSTITUTIONAL RIGHTS.

This Court's most recent decision in this case does not even consider the constitutional arguments raised by

the holding that the State must tax racing industry revenues and turn those tax proceeds over to the tribes.[13] To the contrary, in a footnote to the decision, it is stated that the racing industry's interest is "questionable" because the racing participants can "pursue any grievance they may have against the State in a separate action if they so choose."[14] The opinion does not discuss how the racing industry might avoid state immunity to any claim for money damages filed in federal court; furthermore, any claim asserted in state court might be subject to legislative appropriation.[15]

The racing industry respectfully asserts that their constitutional interest in revenues generated by their commercial activities cannot be so easily dismissed.

The State's taxing authority is of course subject to the due process guarantees of the United States Constitution. Furthermore, it is a fundamental tenet of tax law that the taxing power exerted by a state must serve a public purpose.[16] Although the public purpose for which the

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[13] The district court's July 19, 1996 order required that "[w]ithin 14 days of this order the State shall pay over to the tribes *the monies that have been assessed as a license fee on parimutuel offtrack wagering at the plaintiffs' simulcast facilities.*" (Excerpt of Record, p. 36; emphasis added.)

[14] Slip Opn. at p. 11053, n. 3.

[15] See, e.g., *Calif. State Employees Assn. v. Flournoy*, 32 Cal.App.3d 219 (1973).

[16] "Inasmuch as public moneys cannot be expended for other than public purposes, it follows that an exercise of the taxing power for merely private purposes is beyond the authority of government." *Analysis and Interpretation of the Constitution of the United States of America*, Congressional Research Service, Library of Congress (1987).

State may collect taxes may be broad, in this case *no* public purpose has ever been identified with respect to the state's "agreement" to tax the racing associations for the benefit of the Indian tribes.

This Court has never addressed the many anomalies which this case presents. The intervention of the racing industry clearly brings some of these difficulties into question. For example, this Court has never attempted to explain how a tax on the racing associations which is invalid as a matter of federal law (as held in *Cabazon II*) must nonetheless continue to be imposed and collected by the State on racing industry revenues and then paid to the tribes. In arguing that such an agreement was never made, the State has pointed out that the California Constitution forbids any branch of government from surrendering the power to tax by grant or contract[17]. Nonetheless, this Court has held that the tribal-state compact represents such a voluntary surrender; viz., an agreement to tax the racing associations and remit those taxes to the Indian tribes.

Given the unprecedented nature of this decision, the petitioning racetracks and horse owners respectfully contend that the Court erred in refusing to permit the racing industry the opportunity to be heard in this matter. As noted in the most recent decision, the test applied to intervention motions is to be interpreted broadly in favor of intervention.[18] Although an appellate court reviews

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[17] California Constitution, Article XIII, section 31. Brief of the State of California, pp. 26-27 and 34-35.

[18] Slip Opinion, p. 11052.

the denial of a motion for intervention on timeliness grounds for abuse of discretion, even in cases where a motion is filed *after judgment*, "the general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal."[19]

This Court held that the racing industry should have intervened sooner because, since the inception of this litigation, it was clear that the racing industry paid the disputed tax. Moreover, this Court held that the compacts clearly contemplated that the State would continue to collect the tax from the racing associations, regardless of whether the court found them permissible.

The petitioning racing industry participants recognize that this Court has held that the issue in this case was always whether the state tax was impermissible for any purpose. However, the fact that the industry did not seek to intervene at an earlier stage in this proceeding is only explained by the fact that, contrary to this Court's opinion, it was *not* clear that the racetracks paid the state tax until the district court and this Court's first opinion so held. Up to that point, the tribes were arguing that they paid the tax. Thus, the issue was solely between the State and the tribes: was the state lawfully taxing the racing industry (in which case taxation would continue) or was it unlawfully taxing the tribes (in which case the tax would be refunded)? This was not an issue meriting intervention by the racetracks. On the other hand, the District Court's second ruling – that the compact required

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[19] *United States v. McGough, et al.*, 967 F.2d 1391, 1394 (9th Cir. 1992)

the State to impose an unlawful tax on the racing industry and pay those funds to the tribes – clearly implicated the rights of race tracks and horse owners.

In sum, it was not clear that the compacts contemplated that the State would continue taxing the racetracks whether or not the tax was impermissible[20] (indeed, such a holding defies logic: how can the State continue a tax that has been declared unlawful?). Rather, both the State and the racing industry held the view that the compacts required a *refund* of the tax to the tribes if the tax was determined to be an unlawful assessment on Indian assets. Placed in this context, the actions of the racing industry in declining to move for intervention until the district court held that the compacts required the State to tax the racing industry and pay those monies to the tribes is eminently reasonable and intervention should have been permitted.

CONCLUSION

For each of the foregoing reasons, petitioners request that a that a [sic] rehearing of the appeal in the above-entitled cause be granted and the above-entitled cause be heard by the court en banc.

DATED: September 16, 1997

Respectfully Submitted,
Nielsen, Merksamer,
Parrinello, Mueller, &
Naylor, LLP

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[20] Slip Opinion, p. 11053.

BY: /s/ Cathy A. Christian
CATHY A. CHRISTIAN
Attorneys for Petitioners/
Proposed Defendant
Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I, CATHY A. CHRISTIAN, certify that the Petition for Rehearing and Suggestion for Rehearing En Banc is double-spaced, proportionately spaced, with a typeface of 14 points, and contains 3,050 words.

DATED: September 16, 1997

Respectfully Submitted,
Nielsen, Merksamer,
Parrinello, Mueller, &
Naylor, LLP

BY: /s/ Cathy Christian
CATHY A. CHRISTIAN
Attorneys for Petitioners/
Proposed Defendant
Intervenors

ADDENDUM

RELEVANT STATUTES

California Business and Profession Code

19605.3. (a) An organization described in Section 19608.2 has executed an agreement approved by the board with the association conducting a racing meeting and the satellite wagering facility. The agreement shall provide, among other things, for all of the following:

(1) The conditions for transmission of the signal.

(2) That the wagers made at the satellite wagering facility will be included in the appropriate conventional or exotic pool at the racetrack where the racing meeting is conducted.

(3) The agreement of the parties, if any, respecting the payment of fees or charges by one party to the other in substitution of, or in addition or supplemental to, the distributions of the amount deducted pursuant to the first paragraph of either Section 19605.7 or Section 19605.71. The agreement as to the payment of those fees or charges shall not operate to increase or reduce the amounts otherwise payable from the amount handled pursuant to this article, other than to a party to the agreement. Any dispute relating to the amount of fees or charges to be paid by any party as a condition of receiving the live audiovisual signal from an association or fair may be appealed to the board. However, nothing in this paragraph shall be construed to require an association or fair to execute an agreement.

(b) The accommodations and equipment used in conducting wagering at the satellite wagering facility and their location have been approved by the board.

(c) The method used by the satellite wagering facility to transmit wagers, odds, results, and other data related to wagering has been approved by the board.

(d)(1) Any association or fair that operates a satellite wagering facility shall conduct wagering on all racing that is offered to the satellite wagering facility, except as otherwise provided in Section 19607.5 with respect to the northern zone, as long as the satellite wagering facility is not sustaining a loss on either a day meeting or night meeting, as determined by the board, and, if sustaining a loss on either a day meeting or night meeting, as long as the satellite wagering facility is reimbursed for that loss by either an organization described in Section 19608.2 or an association. Any association that operates a satellite wagering facility may, but is not required to, accept an audiovisual signal. Notwithstanding any other provision of this paragraph, an association that conducts a racing meeting and a fair that operates a satellite wagering facility may agree to provide an audiovisual signal and to accept wagering on less than all of the races. Acceptance of the audiovisual signal may be on such terms and conditions, including the payment of fees and charges, subject to paragraph (3) of subdivision (a), as the parties may mutually agree.

(2) In calculating the loss, if any, for operating a satellite wagering facility for a night meeting, only the expenses incurred by the satellite wagering facility because of the acceptance of night wagers shall be considered, and no overhead expenses or expenses of the satellite wagering facility which would be incurred regardless of the acceptance of night wagers shall be considered.

(e) Notwithstanding any other law or any agreement under subdivision (a), for purposes of determining license fees and breakage at the racetrack where the racing meeting is conducted, wagers at a satellite wagering facility shall not be included in the conventional or exotic pools of the association conducting the racing meeting.

(f) The horsemen's organization that represents the horsemen at the association that conducts the racing meeting on which wagers are accepted consents to the acceptance of wagers at the satellite wagering facility, except that the association or fair operating the satellite wagering facility may appeal the withholding of consent to the board that may determine that consent is not required.

19605.7. The total percentage deducted from wagers at satellite wagering facilities in the northern zone shall be the same as the deductions for wagers at the racetrack where the racing meeting is being conducted and shall be distributed as set forth in this section. Amounts deducted under this section shall be distributed as follows:

(a) For thoroughbred meetings, 2.5 percent of the amount handled by the satellite wagering facility on conventional wagers and 4 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and such commission is not for the use of any real property, 2.5 percent or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to a organization described

in Section 19608.2, and four-tenths of 1 percent deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2, and thirty-three hundredths of one-tenth of 1 percent distributed to the California Center for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of the Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(b) For harness, quarter horse, Appaloosa, Arabian, or mixed breed meetings, 1 percent of the amount handled by the satellite wagering facility on conventional wagers and 1 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, for fair meetings, 1.5 percent of the amount handled by the satellite wagering facility on conventional wagers and 3 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and such commission is not for the use of any real property, and 6 percent of the amount handled by the satellite wagering facility or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to an organization described in Section 19608.2. In addition, in the case of quarter horses, four-

tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (b) of Section 19617.7 and shall thereafter be distributed in accordance with subdivisions (c), (d), and (e) of Section 19617.7; in the case of Appaloosas, four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (b) of Section 19617.9 and shall thereafter be distributed in accordance with subdivisions (c), (d), and (e) of Section 19617.9; in the case of Arabians, four-tenths of 1 percent shall be distributed as breeders' awards to breeders of Arabians; in the case of standardbreds, four-tenths of 1 percent shall be distributed for the California Standardbred Sires Stakes Program pursuant to Section 19619; in the case of thoroughbreds,four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2; and thirty-three hundredths of one-tenth of 1 percent shall be distributed to the California Center for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of the Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(c) In addition to the distributions specified in subdivision (a) and (b), for thoroughbred and fair meetings only, six-tenths of 1 percent of the total amount handled by each satellite wagering facility authorized pursuant to

Section 19605.1 and one-half of 1 percent of the total amount handled at each other satellite wagering facility shall be allocated to the facility for promotion of that meeting's program. For mixed breed meetings, 1 percent of the total amount handled by each satellite wagering facility shall be distributed to an organization described in Section 19608.2 for promotion of the program at satellite wagering facilities. For quarter horse meetings and harness meetings, one-half of 1 percent of the total amount handled by each satellite wagering facility shall be distributed to an organization described in Section 19608.2 for the promotion of the program at satellite wagering facilities, and one-half of 1 percent of the total amount handled by each satellite wagering facility shall be distributed according to a written agreement for each race meeting between the licensed racing association and the organization representing the horsemen participating in the meeting.

(d) In addition to the distributions specified in subdivisions (a),(b), and (c), for thoroughbred meetings, four-tenths of 1 percent of the total amount handled at each satellite wagering facility authorized pursuant to Section 19605.1 and one-half of 1 percent of the total amount handled at each other satellite wagering facility shall be allocated to the association conducting the racing program to reimburse it for any costs of offsite stabling and vanning that are required pursuant to Section 19535. The amount of the reimbursement payable to an association for offsite stabling shall not exceed the actual cost to the association of maintaining stalls at its racetrack plus the actual costs incurred by the association to provide

vanning and transportation of racehorses from offsite stabling facilities to its racetrack.

(e) In addition to the distributions specified in subdivisions (a), (b), and (c), for fair meetings, four-tenths of 1 percent of the total amount handled at each satellite wagering facility authorized pursuant to Section 19605.1 and one-half of 1 percent of the total amount handled at each other satellite wagering facility shall be allocated to the organization representing racing fairs to reimburse fairs for the actual cost of providing offsite stabling and vanning required by the board pursuant to Section 19535. If fairs contract with associations to provide offsite stabling during fair meetings, the cost incurred by fairs shall not exceed the actual cost to the association of maintaining the stalls or the amount of reimbursement funds made available pursuant to this subdivision, whichever is less. In the event of a disagreement between an association and the organization representing racing fairs or the organization representing the majority of horsemen participating at the meeting with respect to the actual cost of maintaining stalls, the board, at the request of the association or the organization representing racing fairs or the organization representing the majority of horsemen participating at the meeting, shall determine within 60 days the amount of actual costs incurred. For purposes of this subdivision, "actual cost" does not include fixed overhead or administrative expenses that would be incurred by the association in the absence of an agreement to provide offsite stabling during fair meetings.

(f) Any of the promotional funds distributed pursuant to subdivision (c) that are not expended in the year in which they are collected may be expended in the

following year. If promotion funds expended in any year exceed the amount collected for that year, the funds expended in the following year shall be reduced by the excess amount.

(g) Any of the stabling and vanning reimbursement funds distributed pursuant to subdivision (d) that are not expended during the meeting at which they are collected shall be allocated to the organization representing racing fairs for additional payments to the racing association to offset its costs of maintaining the stalls contracted for by fairs pursuant to subdivision (e).

(h) Additionally, for thoroughbred, harness, quarter horse, mixed breed, and fair meetings, thirty-three hundredths of 1 percent of the total amount handled by each satellite wagering facility shall be paid to the city or county in which the satellite wagering facility is located pursuant to Section 19610.3 or 19610.4.

(i) Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section.

19605.71. The total percentage deducted from wagers at satellite wagering facilities in the central and southern zone shall be the same as the percentage deducted from wagers at the racetrack where the racing meeting is being conduced and shall be distributed as set forth in this section. Amounts deducted by a satellite wagering facility under this section shall be distributed as follows:

(a) For thoroughbred meetings, 2.5 percent of the amount handled by the satellite wagering facility on conventional wagers and 4 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and such commission is not for the use of any real property, 2.5 percent or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to an organization described in Section 19608.2, and four-tenths of 1 percent deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2, and thirty-three hundredths of one-tenth of 1 percent distributed to the California Center for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of the Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(b) For harness, quarter horse, Appaloosa, Arabian, or mixed breed meetings, 1 percent of the amount handled by the satellite wagering facility on conventional wagers and 1 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, for fair meetings, 1.5 percent of the amount handled by the satellite wagering facility on conventional

wagers and 3 percent on exotic wagers shall be distributed to the racing association for payment to the state as a license fee, 2 percent retained by the satellite wagering facility as a commission for the right to do business, as a franchise, and each commission is not for the use of any real property, and 6 percent of the amount handled by the satellite wagering facility or the amount of actual operating expenses, as determined by the board, whichever is less, distributed to an organization described in Section 19608.2. In addition, in the case of quarter horses, four-tenths of 1 percent shall be distributed as breeders' awards to breeders of quarter horses pursuant to Section 19617.6; in the case of Appaloosas, four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (b) of Section 19617.9 and shall thereafter be distributed in accordance with subdivisions (c), (d), and (e) of Section 19617.9; in the case of Arabians, four-tenths of 1 percent shall be held by the association to be deposited with the official registering agency, pursuant to Section 19617.8, and thereafter shall be distributed in accordance with Section 19617.8; in the case of standardbreds, four-tenths of 1 percent shall be distributed for the California Standardbred Sires Stakes Program pursuant to Section 19619; in the case of thoroughbreds, four-tenths of 1 percent shall be deposited with the official registering agency pursuant to subdivision (a) of Section 19617.2 and shall thereafter be distributed in accordance with subdivisions (b), (c), and (d) of Section 19617.2; and thirty-three hundredths of one-tenth of 1 percent shall be distributed to the California Center

for Equine Health and Performance and sixty-seven hundredths of one-tenth of 1 percent distributed to the California Veterinary Diagnostic Laboratory System, School of Veterinary Medicine, University of California at Davis. It is the intent of he Legislature that the thirty-three hundredths of one-tenth of 1 percent of funds distributed to the California Center for Equine Health and Performance shall supplement, and not supplant, other funding sources.

(c) In addition, for thoroughbred meetings and harness, Appaloosa, mixed breed, or fair meetings, 1 percent shall be distributed to an organization described in Section 19608.2 for promotion of the program at satellite wagering facilities. Notwithstanding any other provision of law, on wagers made in the Counties of Orange and Los Angeles on thoroughbred races conduced in the County of Orange or Los Angeles, or both, excluding the 50th District Agricultural Association, the amount deducted for promotion of the satellite wagering program at satellite wagering facilities shall be one-half of 1 percent. Any of the promotion funds that are not distributed in the year in which they are collected may be distributed in the following year. If promotion funds distributed in any year exceed the amount collected for that year, the funds distributed in the following year shall be reduced by the excess amount. For quarter horse meetings, one-half of 1 percent of the total amount handled by each satellite wagering facility shall be distributed to an organization described in Section 19608.2 for the promotion of the program at satellite wagering facilities, and one-half of 1 percent of the total amount handled by each satellite

wagering facility shall be distributed according to a written agreement for each race meeting between the licensed racing association and the organization representing the horsemen participating in the meeting. To the extent that funds representing a percentage greater than one-half of 1 percent of funds wagered on thoroughbred races conducted in the Counties of Orange and Los Angeles have been distributed, prior to July 27, 1992, to an organization described in Section 19608.2 for promotion activities, but remain unused, those funds shall be redistributed, 50 percent as commissions to the association that conducts the racing meeting, and 50 percent as purses to the horsemen participating in the racing meeting. Additionally, thirty-three hundredths of 1 percent of the total amount handled by the satellite wagering facility shall be paid to the city or county in which the satellite wagering facility is located pursuant to Section 19610.3 or 19610.4.

(d) Notwithstanding any other provision of law, a racing association is responsible for the payment of the state license fee as required by this section.

19606.1. (a) Except as otherwise provided in Section 19606.3, all revenues distributed to the state as license fees from satellite wagering facilities shall be deposited in a separate account in the fund and, notwithstanding Section 13340 of the Government Code, are continuously appropriated from that account to the Department of Food and Agriculture, for allocation by the Secretary of Food and Agriculture, at his or her discretion, for the purposes set forth in paragraphs (1) to (6), inclusive. The concurrence of the Director of Finance shall be required for allocations pursuant to paragraphs (1) and (2). Allocations pursuant to paragraphs (3) to (6),

inclusive, shall be made with the concurrence of the Joint Committee on Fairs Allocation and Classification.

(1) For the repayment of the principal of, interest on, and costs of issuance of, and as security, including any coverage factor, pledged to the payment of, bonds issued or to be issued by a joint powers agency or other debt service or expense, including repayment of any advances made or security required by any provider of credit enhancement or liquidity for those bonds or other indebtedness or expenses of maintaining that credit enhancement or liquidity, incurred for the purpose of constructing or acquiring improvements at a fair's racetrack inclosure, satellite wagering facilities at fairs, health and safety repair projects, or handicapped access compliance projects at fairs or for the purpose of refunding bonds or other indebtedness incurred for those purposes. As used in this paragraph, "coverage factor" means revenues in excess of the amount necessary to pay debt service on the bonds or other indebtedness, up to an amount equal to 100 percent more than the amount of that debt service, which a joint powers agency, pursuant to the resolution or indenture under which the bonds or other indebtedness are or will be issued, pledges as additional security for the payment of that debt service or is required to have or maintain as a condition to the issuance of additional bonds or other indebtedness. Notwithstanding any other provision of law, the department may also commit any funds available for allocation under Article 10 (commencing with Section 19620) to complete projects funded under this paragraph in the priority described in this paragraph.

(2) For payment to the State Race Track Leasing Commission to be pledged for the repayment of debt necessary to construct a racetrack grandstand at the 22nd District Agricultural Association fairgrounds. This payment shall be made only if the Secretary of Food and Agriculture determines, annually, that all other pledged revenues have been applied to the repayment of that debt and have been determined by the secretary to be inadequate for that purpose.

(3) For the payment of expenses incurred in establishing and operating satellite wagering facilities at fairs.

(4) For the support of an equipment and operating fund to produce and display a consolidated California signal at satellite wagering facilities and fairs.

(5) For health and safety repair projects at fairs, which includes fire and life safety improvement projects, California Code of Regulations compliance projects, and long-term deferred maintenance projects.

(6) For the development and payment of revenue generating projects, the establishment of pilot projects to restructure the current fair system, and for projects realizing a cost savings for more efficient utilization of existing fair resources.

(b) The Secretary of Food and Agriculture may not make an allocation for purposes of paragraphs (2) to (6), inclusive, of subdivision (a) until the payments required in any fiscal year pursuant to paragraph (1) of subdivision (a) have been funded.

(c) Pursuant to subdivision (a), the Joint Committee on Fairs Allocation and Classification shall review and

concur, or not concur, with the secretary's determination of the allocations to be made pursuant to paragraphs (3) to (6), inclusive, of subdivision (a) in total, and the committee may not add to, or delete projects or line items from, the proposed allocations.

(d) Approval of the Joint Committee on Fairs Allocation and Classification is deemed complete when one of the following conditions is met:

(1) The annual budget act is enacted.

(2) If the secretary's recommendations are received by the Joint Committee on Fairs Allocation and Classification after the enactment of the annual budget act, the recommendations shall be deemed approved 30 days after they are received unless they are rejected by the committee.

(e) If the Joint Committee on Fairs Allocation and Classification does not concur with the secretary's recommendations, the secretary may submit another set of recommendations to the committee pursuant to this section.

(f) The payments required in any fiscal year for the purposes of paragraphs (1) to (3), inclusive, of subdivision (a) shall be made before any transfer is made pursuant to subdivision (g).

(g) Except as otherwise provided in subdivision (f), when the revenues deposited in the separate account exceed eleven million dollars ($11,000,000) in any fiscal year, 98 percent of the amount in excess of eleven million dollars ($11,000,000) shall be transferred to the General Fund.

(h) All of the costs of administering the accounts created by subdivision (a) and Section 19606.3 shall be charged to the respective accounts.

SEC. 31. The power to tax may not be surrendered or suspended by grant or contract. [*New section adopted November 5, 1974.*]

PROOF OF SERVICE BY MAIL
(Code Civ. Proc. § 1013(a))

I am over the age of 18 years and not a party to the within action; my business address is 770 L Street, Suite 800, Sacramento, CA 95814.

On September 16, 1997, I served the foregoing **PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC** on the parties in said action by enclosing a true copy thereof in an envelope and placing the envelope for collection and mailing on the date and at the place set forth above following our ordinary business practices, addressed as follows:

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Executed on September 16, 1997, at Sacramento, California.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CABAZON AND SYCUAN BANDS OF MISSION INDIANS, Plaintiffs/Appellees, and **BARONA AND VIEJAS BANDS OF MISSION INDIANS,** Intervenors-Plaintiffs/Appellees, vs. **PETE WILSON,** Governor of the State of California; **STATE OF CALIFORNIA;** and **CALIFORNIA HORSE RACING BOARD,** Defendants/Appellants.	No. 96-16432 No. 96-16443
SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., ET AL., Applicants in Intervention/Appellants.	

RESPONSE OF PLAINTIFF-APPELLEE TRIBES TO PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

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I. THE RACING INDUSTRY HAS FAILED TO PRESENT ANY COGNIZABLE GROUNDS FOR REHEARING OR REHEARING EN BANC.

A. The Panel applied the proper standard of review and correctly affirmed the district court's determination that the Racing Industry waited too long to intervene.

F.R.A.P. 40 requires that a petition for rehearing "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." The Racing Industry's Petition for Rehearing ("Petition" or "RIP") does neither. Instead, the Racing Industry contends that this panel should determine *de novo* the timeliness of its application for intervention, and consider the arguments it would have made to the district court had intervention been granted. This court, however, is to review the district court's denial of intervention solely for an abuse of discretion; a determination of untimeliness obviates the need to consider – much less determine – whether the Racing Industry satisfied the other criteria for intervention as of right. *See, e.g., United States v. State of Washington*, 86 F.3d 1499 (9th Cir. 1996); *see also, County of Orange v. Air California*, 799 F.2d 535 (9th Cir. 1986); *Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc.*, 62 F.3d 1217 (9th Cir. 1995); *League of United Latin American Citizens v. Wilson*, 1997 WL 769372, 97 D.J.D.A.R. 15021 (9th Cir., Dec. 12, 1997).

Abuse of discretion is precisely the standard by which the panel reviewed this case. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061. Consequently,

the Racing Industry has no right to reargue the merits of its illusory claims in its Petition.

Even if *de novo* review of the district court's denial of intervention as untimely was appropriate, the record amply supports the wisdom of that court's decision. The Racing Industry does not deny that it waited nearly six years after this action was filed before seeking intervention; that it delayed its petition for more than two years after this Court's May 9, 1994 decision that IGRA preempted the State from taxing wagers placed on Tribal lands (*Cabazon Band of Mission Indians, et al. v. Wilson, et al.*, 23 F.3d 1535, Opinion withdrawn and superseded, 37 F.3d 430 (9th Cir., October 6, 1994); or that it dawdled almost two years after this Court's final opinion in *Cabazon II, id.*, before finally trying to intervene.

Despite the passage of so much time and receipt of multiple warnings that the Tribes – not the State or the Racing Industry – would be awarded what the State formerly received as a license fee, the Racing Industry *still* postponed its petition seeking intervention. The Racing Industry did, ultimately, petition to intervene – seven months after the State amended its answer to assert the absence of the Racing Industry as an affirmative defense, and nearly three months after the district court concluded that the Racing Industry need not be joined, resolved the remaining issues in the case in favor of the Tribes and ordered the State to pay the disputed fees over to the Tribes. At that point, the Racing Industry had to sustain a

heavy burden to prevail.[1] The Racing Industry's excuse for waiting so long to seek intervention, *i.e.*, that the case was so complex that its lawyer, who had represented the State in this action for the preceding five years and in November, 1995, asserted on behalf of the State the Racing Industry's non-joinder as the State's Fifth Affirmative Defense to the Tribes' respective Amended Complaints (*see e.g.*, C.R. 98), needed another eight months to figure it out.

The State always has argued that both the legal incidence and economic burden of the State license fee falls on the Racing Industry, the district court and *Cabazon I* agreed with that contention, and since 1990 the Racing Industry has entered into successive agreements with the Tribes affirmatively disclaiming the Racing Industry's right to or interest in the disputed fees. *See, e.g., Cabazon Band of Mission Indians v. Wilson*, 788 F.Supp. 1513 (E.D. Cal. 1992); State's Opening and Reply Briefs in *Cabazon II;* CR 131, and attached Exhibits. Moreover, and as correctly noted by this panel, even if the Racing Industry had no immediate interest in the original litigation, "surely they should have known what was in the offing after our October 1, 1994 decision in Cabazon II and after the

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[1] As the Ninth Circuit recently held in *League of United Latin American Citizens v. Wilson, supra*, 97 D.J.D.A.R. at 15022,

> In considering these factors, however, we must bear in mind that "any substantial lapse of time weighs heavily against intervention." [Cit. Om.] Because ACNFARI filed its motion a full twenty-seven months after the original actions challenging Proposition 187 were commenced, it fights an uphill battle in its effort to intervene.

district court, on July 12, 1995, ordered the Bands to file a new complaint to enforce ¶19(B)(3)." *Id.* In fact, this finding was far more solicitous of the Racing Industry than it deserved.

Neither State law, the actual language of ¶19 of the Compacts,[2] nor the positions taken by the parties[3] has

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[2] The language of ¶19(B) of the Cabazon Compact is set forth in the Court's Opinion. 124 F.3d at 1050. The virtually identical language of ¶19(B)(3) in the Sycuan Compact is reproduced below:

> In the event that a final judgment is obtained that the deduction and distribution of a state license fee is impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Sycuan the amount of the state license fee previously distributed to the State under this Compact, exclusive of the assessments due and owing under subparagraph (4) below, and Sycuan shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility. The amount of state license fee previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility, and such pre- or post-judgment interest, if any, as the Court may determine, shall be paid over to Sycuan as soon as practicable, and in any event not later than sixty (60) days following the entry of final judgment.

[3] From the beginning, the State has argued that its tax is on the Racing Industry and thus is not impermissible under IGRA. The Tribes have argued, from the beginning, that the State's tax on wagers at the Tribes' simulcast facilities is impermissible under IGRA regardless of the legal incidence of the tax, that IGRA allows the State and the Tribes to alter the State's statutory distribution formula so that the Tribes will receive the tax that the State otherwise would receive, and thus that under

ever left open a possibility that the Racing Industry might be entitled to the windfall that it sought by its untimely application for intervention. Conversely, IGRA specifically authorizes the result of *Cabazon II* and the decision of the panel, in that 25 U.S.C. §2710(d)(3)(C)(iv) specifically contemplates the shifting of taxation of on-Reservation Class III gaming activity from the State to Tribes.[4] That is, in effect, exactly what the State and the Tribes agreed in these Compacts, and that is why *Cabazon II*, the district court and this panel properly determined that the Tribes – not the Racing Industry – are entitled to an amount equal to past and future State license fees on the gross handle of wagers at the Tribes' simulcast facilities.

Because the Racing Industry did not seek post-judgment intervention for purposes of appealing from the district court's judgment or from an order denying class certification, its reliance on cases such as *United States v. McGough*, 967 F.2d 1391 (9th Cir. 1992), and *United Airlines v. McDonald*, 432 U.S. 385 (1977), is misplaced. In hindsight, the Racing Industry may have "bet on the

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the Compacts, the Tribes are entitled to receive an amount equivalent to the State tax on bets at their facilities.

[4] That section provides in relevant part:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . .

Thus, under *Cabazon II*, if the State cannot tax wagers placed at the Tribes' facilities, the State and the Tribes may agree in their Compacts that the Tribes may do so.

wrong horse" when it sat back and let the State represent its purported interest in the license fees. That, however, is precisely the choice made by the Racing Industry, which must now live with the consequences of its choice.[5]

B. The Racing Industry has not presented any reasons for granting rehearing en banc.

F.R.A.P. 35 permits a case to be heard *en banc* when necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance. The Racing Industry has suggested rehearing *en banc*, but its Petition for Rehearing neither identifies any conflicting decisions of other Ninth Circuit panels, nor demonstrates why review of the district court's exercise of discretion to deny intervention involves a question of exceptional importance. Accordingly, the Racing Industry's suggestion for rehearing *en banc* should be rejected.

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[5] As another Ninth Circuit panel aptly observed in affirming the denial of intervention as untimely in *Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc., supra*, at 1222 (Wiggins, J.), "It seems inequitable to allow a latercomer, who fiddled while Rome burned, to collect a share of the fire insurance."

II. THE STATE HAS NOT PRESENTED ANY COGNIZABLE BASIS FOR REHEARING OR REHEARING EN BANC.

A. The grounds for rehearing asserted by the State are precluded by the law of the case.

As the Ninth Circuit interprets and applies the jurisprudential doctrine of "law of the case," the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996); *Kimball v. Callahan*, 590 F.2d 268, 771 (9th Cir. 1974), *cert. denied*, 444 U.S. 826 (1979)[6]; *see also, Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997, en banc).[7]

Although the law of the case doctrine is discretionary, the Court's discretion is not unfettered. Rather, the prior decision must be followed unless: 1) the decision is clearly erroneous and its enforcement would work a manifest injustice; 2) intervening controlling authority or statute makes reconsideration appropriate; or 3) substantially different evidence was adduced at a subsequent trial. *Jeffries v. Wood, supra, at* 1489. Nothing in the State's

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[6] "[U]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case."

[7] "Law of the case rules are founded upon 'the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.' " *Id.*, at 1489.

Petition for Rehearing ("Petition" or "SP") supports application of any of the exceptions to the law of the case doctrine.

Having failed to seek further review of *Cabazon II*, the State cannot show that it was clearly erroneous. Indeed, this panel found that "Our decision in *Cabazon II* is central to the resolution of the instant dispute, and it limits the task before us." *Cabazon Band v. Wilson*, 124 F.3d at 1054.[8]

Neither can the State show the exceptional circumstances necessary to establish a manifest injustice, because *Cabazon II* did not involve "a significant inequity or the extinguishment of a right." *See, Jeffries v. Wood*,

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[8] The State is simply wrong when it asserts that this panel reconsidered the Court's opinion in *Cabazon v. Wilson*, 37 F.3d 430 (9th Cir. 1994). SP, p. 10. There can be no doubt from this panel's Opinion that this panel *relied on* – rather than reconsidered – *Cabazon II* when it observed that *Cabazon II*,

> . . . held that "IGRA preempts the State of California from taxing offtrack betting activities on tribal lands." [cit.om.] Analyzing "whether Congress has, by implication, acted to preempt the extension of state authority onto Indian reservations in this instance," [cit.om.], we considered federal, tribal, and state interests in the extension of the State's licensing scheme to tribal gaming. Central to our analysis was our conclusion that, under the terms of the compacts which govern this case, the Bands have a "right" to the unpaid license fees. We remanded to the district court with instructions to enter summary judgment in favor of [the Tribes]. Our decision in Cabazon II is central to the resolution of the instant dispute and it limits the task before us.

Cabazon Band v. Wilson, 124 F.3d 1050, 1054.

supra, at 1492. The panel in *Cabazon II*, the district court on remand and this panel each found that there has not been *any* inequity in holding the State to the agreement of the parties reflected by the plain language of ¶19 of the Compacts.

Finally, no intervening case law or statute warrants reconsideration of the final judgment in *Cabazon II*, from which the State did not seek certiorari. The district court gave the State every opportunity to argue that *Cabazon II* should not control the outcome on remand. Those arguments were made to and properly rejected by both the district court and this panel. The State's concoction of new variations on its old themes does not justify ignoring *Cabazon II* as the law of this case.

B. The State otherwise has failed to demonstrate any cognizable basis for rehearing.

The State's Petition, at pages 4-7, not only seriously misstates the plain language of ¶19 of the Compacts, but further attempts to interject a revisionist history of the compact negotiations that neither is accurate nor part of the record in this case. ¶19 of the Compacts makes absolutely clear that both the State and the Tribes understood that the wagers placed at the Tribes' facilities would be taxed. Moreover, there never was any dispute between the parties that under State law, as *partially* incorporated into the Compacts, the Racing Associations would deduct taxes from wagers placed at the Tribes' facilities.[9] Thus,

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[9] The panel correctly noted that, "from the inception of this litigation, it was clear that the license fees at issue in this case are paid by the racing associations." 124 F.3d at 1061.

the only point of contention, the only issue addressed in ¶19 and the only issue sought to be adjudicated by the Tribes in this litigation is whether the taxes deducted from wagers placed at the Tribes' facilities are to be distributed to the State or to the Tribes.

¶19 of the Compacts allows only the Tribes or the State to get the money – not the Racing Industry. The State's subsequent arguments – that depending on the basis upon which the legal issue was resolved, the State might be, and in fact should have been, relieved of its obligation to require continued collection of the taxes by the Racing Associations and payment of those monies to the Tribes as tax revenues generated by on-Reservation wagering activity – clearly is *post hoc* revisionism that is belied by the plain language of ¶19.

The State's repeated assertion that the decisions in this case require it "to tax the racing industry for the benefit of the Tribes," *see, e.g.*, SP, at page 6, n. 3, similarly is inaccurate. Rather, these decisions merely require the State to fulfill its agreement with the Tribes – which has the force of federal law by virtue of incorporation into the Compacts – by requiring the Racing Associations to continue collecting taxes from the wagers placed at the Tribes' facilities and to pay those particular taxes over to the Tribes as a Tribal tax on the on-Reservation wagers.[10]

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[10] Calif. Bus. & Prof. Code § 10605.3(e) provides as follows:

> (e) Notwithstanding any other law or any agreement under subdivision (a), for purposes of determining license fees and breakage at the racetrack where the racing meeting is conducted, wagers at a satellite wagering facility shall not be

There is nothing unconstitutional or illegal about this arrangement. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (holding that a Tribe may tax on-Reservation transactions). In fact, it is merely one of only two contingencies that the State itself negotiated in ¶ of the Compacts, and which was approved by the Secretary of the Interior when he approved these Compacts.

When the State's labyrinthine Petition is stripped of its italicized invective, self-serving – and inaccurate – historical narrative,[11] and repeated expressions of regret over the bargain that it struck with the Tribes, it is revealed as nothing more than a repackaging of the same arguments that were rejected in *Cabazon II*, by the district court on remand and again by this panel.

When the State claims that, "[t]he parties had agreed that, if the tax were found impermissibly to burden tribal assets, then the State would restore the taxes to the Bands[,]" SP, at p. 6), it fails to rely on anything in the record. This contradiction is also contrary to the actual

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included in the conventional or exotic pools of the association conducting the racing meeting.

[11] The State repeatedly – and erroneously – contends that *Cabazon II* rested upon the Court's finding that allowing the State to collect its license fee would result in the State receiving more revenue from the on-Reservation wagering than the Tribe, contrary to IGRA's requirement that the Tribe be the primary beneficiary of on-Reservation gaming. As this panel's Opinion recognized, *Cabazon II* determined that the State's jurisdiction to assess its tax against on-Reservation wagering activity instead was preempted under the "balancing test" used to resolve jurisdictional conflicts in Indian country.

language of ¶19. In fact, this contention is a mere continuation of the State's baseless – and thrice-rejected – attempt to inject into this case its *post hoc*, subjective interpretation of what it intended to agree to in ¶19. The State's [illegible]tion not only furnishes no basis for now admitting extrinsic evidence of the State's subjective intent, but also provides no grounds for disregarding the conclusion of every court that has considered this assertion.

In arguing that the panel's purported abandonment of the "primary benefits" analysis means that the State's license fee is just as negotiable as are the other "takeouts" from wagers at the Tribes' simulcast facilities, and thus that the State should have won *Cabazon II*, the State has distorted this panel's analysis beyond recognition. The compacts themselves reflect the parties agreement that

> subject to subsections (B) and (C) below, the amounts deducted from parimutuel wagers from [Tribal facilities], and the distribution of such amounts, shall be the same as that provided for under state law for simulcast wagering facilities.

¶19(A) of Cabazon Compact; Exhibit 2 to Cabazon and Sycuan Opposition to Appellants' Rule 27-3 Emergency Motion. In fact, the Panel acknowledged the qualitative distinction between "takeouts" that directly or indirectly compensate the Racing Industry and others for services actually provided to the Tribal facilities, and deduction and distribution to the State's general fund of the State's tax on wagers placed at the Tribes' facilities.

Any complexity in this case on remand was not due to *Cabazon II*. *Cabazon II* could not have been clearer. Had

the district court promptly done as instructed therein, these protracted proceedings would have been over literally years ago. All that should have happened on remand was what the Tribes attempted to accomplish by their motion for further relief pursuant to 28 U.S.C. §2202; *i.e.*, immediate entry of summary judgment for the Tribes ordering the State 1) to pay over to the Tribes the license fees previously distributed to the State and 2) to take such measures as might be necessary to accomplish the future disbursement to the Tribes of sums equal to what otherwise would be deducted and distributed to the State as a license fee on wagers placed at the Tribes' facilities.[12]

At worst, all of this could – and should – have been accomplished by the district court's granting of the Tribes' motion for further relief pursuant to 28 U.S.C. §2202, after the State tried to repudiate the commitments that it specifically made in the Compacts. In short, the Tribes never should have been forced to file amended complaints to enforce the Compacts; they should not have had to do anything more than seek enforcement of a judgment promptly entered on remand, as this Court specifically directed.

The State's assertion that it "declined to be bound by a compact whose terms were *dictated* by a panel of this Court," SP at p. 7 [emphasis original], had and has no cognizable basis. The State, ably represented by legal

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[12] "We conclude that IGRA preempts the State of California from taxing offtrack betting activities on tribal lands. Accordingly, the district court's grant of summary judgment is reversed and remanded with instructions to enter summary judgment for the Bands." *Cabazon II*, 37 F.3d 435.

counsel, freely agreed to the plain language of ¶19 of the Compacts. That the State currently regrets the tax-distribution provisions that now apply to the Tribes' simulcast facilities as a matter of federal law provides no justification for forcing the Tribes to relitigate this matter yet again.

Neither is there any basis for the State's contention that the Court's decisions "stripped the State of any benefit of its bargain with the Bands[,]" SP, at pp. 6-7, deprived the State of tax revenues that it otherwise would be entitled to collect and forced the State to collect taxes on behalf of the Bands. Under IGRA, the State has no right to exclude Tribes from engaging in Class III gaming solely to protect state-sanctioned competitors; likewise, IGRA does not entitle the State to derive any revenues or other financial benefit from Tribal gaming beyond reimbursement for the State's regulatory costs, if any.[13] Rather, the "benefits" that were conferred upon a State by entering into the Compacts included integration of the Tribal facilities into the State-supervised system, creation of additional sources of revenue for the Racing Industry and prevention of the Tribes' establishment of their own race books which the State otherwise would have no jurisdiction to regulate. *See, e.g., Sycuan Band of Mission Indians v. Roache, supra.*

The State's argument that the panel's most recent Opinion violates the State's rights under the Tenth

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[13] As noted in *Cabazon II*, the Compacts specifically provide for Tribal reimbursement of the State's actual regulatory costs, which were minuscule in comparison with the license fees collected.

Amendments ignores the simple fact that the federal government hasn't commandeered anything from the State. Simply put, the State *agreed* with the Tribes that if its authority to tax the wagers made at the Tribes' simulcast facilities was impermissible under IGRA, an amount equal to the State's tax would be paid over to the Tribes, and in the future the Tribes would receive an amount equal to what otherwise would be deducted and paid over to the State. If, as the State argues (and the district court found), the license fees are remitted by the Racing Industry, there is no need to involve the State in future collections. Moreover, the State has agreed to a mechanism for payment over to the Tribes of fees previously distributed to the State. *See, e.g.*, September 25, 1996 Stipulation for Modification of Order Staying Judgment, and October 22, 1996 Order thereon filed in this Court.

Two final points warrant discussion. First, at least two Courts of Appeals have concluded that IGRA does not violate the State's rights under the Tenth Amendment. *See, e.g., Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), vacated on other grounds, ___ U.S. ___, 116 S.Ct. 1410 (1996), holding that IGRA does not violate Tenth Amendment affirmed on remand, 89 F.3d 690 (10th Cir. 1996). Second, that the district court clearly had jurisdiction over the Tribes' action.

The panel found two alternative grounds for sustaining such jurisdiction. First, this case involves important federal interests codified in IGRA – interests that in and of themselves give rise to federal question jurisdiction. *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804,

814, n. 12 (1986). Under IGRA, Congress gave Tribes the right to conduct Class III gaming pursuant to negotiated compacts, and outlined the rights Tribes and States could have under those compacts. This case established and enforced these federal rights and, as the Supreme Court has stated, "the federal nature of the right to be established is decisive" of whether the action arises under federal law. *Gully v. First National Bank*, 299 U.S. 109 (1936).

Alternatively, the panel correctly found federal question jurisdiction in this case under 28 U.S.C. §1362, in that *Cabazon II* held that federal law preempts the State's retention of taxes in this case, and the Bands' suit merely sought recovery of monies collected and held by the State in violation of federal law. In another IGRA case, the Seventh Circuit found federal question jurisdiction, noting that the right to be enforced was federal in nature, "whether its source is the IGRA, the Compact, the Indian Commerce Clause or federal recognition of the inherent sovereign powers of an Indian tribe." *Forest County Potowatomi Community v. Norquist*, 45 F.3d 1079, 1082 (7th Cir. 1995). Likewise here, the Tribes' right to the funds in question arises under federal law.

Finally, there is a third basis for sustaining jurisdiction in this case. All parties, including the State and the dissenting judge on the panel, agree that the district court had jurisdiction to adjudicate the Tribes' action for original declaratory judgment. That being the case, the court necessarily had jurisdiction under 28 U.S.C. §2202 to enter such further orders as were necessary to give complete and effectual relief consistent with its declaratory judgment. *Rincon Band of Indians v. Harris*, 618 F.2d 569,

575 (9th Cir. 1980); *Horn & Hardart Co. v. Nat'l, Rail Pass. Corp.*, 843 F.2d 546, 548-49 (D.C. Cir. 1988). Although the district court allowed the case on remand to become more complex, the order finally entered could and should have been entered in response to the Tribes' motion for further relief under 28 U.S.C. §2202, a motion over which the court plainly had jurisdiction. Because this Court can affirm on any ground presented, whether or not relied upon by the district court, *see e.g., Fosson v. Palace (Waterland), Ltd.*, 78 F.3d 1448 (9th Cir. 1996), the panel should find that the district court had jurisdiction over the Tribes' action.

C. The State has not demonstrated a need for rehearing en banc.

Although F.R.A.P. 35 allows for rehearing *en banc* only when necessary to secure or maintain uniformity of its decisions, or when the proceeding involves a question of exceptional importance, the State contends only that rehearing *en banc* is necessary, "because the Court overlooked serious flaws in its jurisdictional analysis." SP, at p. 15.

The State has not identified any other Ninth Circuit decision with which the panel's opinion conflicts or otherwise is inconsistent. Thus, *en banc* consideration is unnecessary to secure or maintain the uniformity of the Court's decisions.

En banc consideration may be appropriate in an extremely unusual case in order to cure a gross injustice. Holding the State to the express terms of the Compact to which it agreed hardly constitutes a gross injustice.

Indeed, the only unusual aspect of this case is the State's persistence in refusing to accept the combined impact of the decisions of *Cabazon II*, the district court on remand and this panel. The panel's adherence to the final and unappealed decision in *Cabazon II* hardly constitutes a question of "exceptional importance" that would warrant *en banc* reconsideration of the panel's decision.

In *Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994), the Court of Appeals held that the Tribe and the State were bound by the terms of the compact they had negotiated, and that neither party could "make an end run" around its existing agreement. *Id.* at 724. Precisely the same conclusion is warranted in this case.

CONCLUSION

For all of the reasons set forth above, and in this case's seventh year, the Petitions should be denied, and the suggestions for rehearing *en banc* should be rejected.

Dated: December 29, 1997

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I, George Forman, certify that Appellees' combined, single Response to the Petitions for Rehearing and Suggestions for Rehearing *En Banc* is double-spaced, uses a Times-New Roman proportionately-spaced typeface of fourteen points, and contains 4,845 words.

Dated: December 29, 1997

/s/ George Forman
GEORGE FORMAN

CERTIFICATE OF SERVICE BY U.S. MAIL

I, Grace C Chiu, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. I am employed in the county of Marin, California. My business address is 4340 Redwood Highway, Suite F228, San Rafael, California 94903.

On December 29, 1997, I served true and correct copies of the **RESPONSE OF PLAINTIFF-APPELLEE TRIBES TO PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC** via United States Mail by placing true and correct copies thereof in separately sealed envelopes, first class postage-prepaid, in the United States Mail in San Rafael, California, addressed as follows:

(2 Copies)

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I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on December 29, 1997 at San Rafael, California.

/s/ Grace C Chiu
Grace C Chiu

No. 97-1636

Supreme Court, U.S.
FILED
MAY 12 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

SOUTHERN CALIFORNIA OFF-TRACK WAGERING, INC., et al.,

Petitioners,

vs.

CABAZON BAND OF MISSION INDIANS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Despite Petitioners' attempt to inject into this petition the merits of the arguments that they would have presented had the district court not denied their motion to intervene, the *only* question fairly presented by the petition is:

Did the district court abuse its discretion in denying the Petitioners' motion to intervene when all of the following factors were present:

1. Petitioners knew about this action and the issues involved from its inception more than six years before they filed their motion to intervene;

2. Petitioners delayed filing their motion to intervene for nearly two years after the Court of Appeals ruled on the merits that the Tribes were entitled to the disputed state license fees;

3. Petitioners still delayed filing their motion to intervene by nearly three additional months after the district court on remand ruled that Petitioners were not indispensable parties and that the judgment in favor of the Tribes mandated by the Court of Appeals could proceed;

4. Petitioners knew from the outset, and certainly since October 1, 1994, that *any* judgment could only be in favor of the existing parties, and not in favor of Petitioners under any circumstances; and

5. Petitioners' motion to intervene was filed in unexcused and unexplained violation of Local Rule 6-142(e) of the district court?

LIST OF PARTIES TO THE PROCEEDING

Del Mar Thoroughbred Club

Hollywood Park, Inc.

Los Angeles Turf Club

Oak Tree Racing Association

Los Alamitos Race Courts

Los Angeles County Fair

Southern California Off-Track Wagering, Inc. (SCOTWINC)

The foregoing parties will be collectively referred to herein as "SCOTWINC"

State of California

Pete Wilson, as Governor of California

California Horse Racing Board

The foregoing parties will be collectively referred to herein as "the State"

Cabazon Band of Mission Indians

Sycuan Band of Mission Indians

Viejas Band of Mission Indians

Barona Group of Capitan Grande Band of Mission Indians

Unless mentioned by name, the foregoing parties will be referred to herein as "Respondent Tribes"

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STATEMENT OF THE CASE

Petitioners' Statement of the Case contains considerable extraneous and erroneous matter that clearly is intended to distract the Court from the only real issue presented by the Petition. Set forth below is a complete and accurate summary of the *relevant* facts and the *relevant* proceedings below.

A. Nature of the Controversy

This litigation began in 1990 as a dispute between the State of California and the Cabazon Band of Mission Indians over the State's jurisdiction to impose its license fee on the gross daily wagers ("handle") placed at the Cabazon Band's simulcast wagering facility.[1] The Band was authorized to operate its simulcast facility by the terms of a Tribal-State compact (the "Cabazon compact") entered into in 1989 pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §2701, *et seq.*

Paragraph 19 of that compact acknowledged that the parties could not agree as to the State's jurisdiction to impose that tax,[2] and provided that the dispute would be

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[1] California allows live on-site wagering on horse races both at race tracks where the race is being run, and off-track wagering at other locations which are linked to the live race by the instantaneous electronic transmission of the audio and visual race signals from the live track to these remote "satellite" locations. The arrangement is known as "simulcast" racing and wagering at remote "simulcast" facilities.

[2] See California Business & Professions Code (hereinafter "B&P Code" §§19605.7, *et seq.* for the entire complex allocation scheme).

resolved through a lawsuit to be filed by the Tribe in the appropriate federal district court within one year of the compact's effective date.[3] The Cabazon Band timely filed such a lawsuit in 1990.

Also in 1990, the State entered into a simulcast wagering compact with the Sycuan Band of Mission Indians (the "Sycuan compact"). In most respects, including ¶19, the Sycuan compact was substantially identical to the Cabazon compact. The Sycuan Band filed its lawsuit under ¶19 of its compact early in 1991, and that suit was consolidated with the Cabazon Band's suit for decision.

In 1990, prior to commencing simulcast wagering operations, the Cabazon and Sycuan Bands both entered into the first of a series of annual operating agreements with SCOTWINC[4] and the Racing Associations that actually host the in-State racing meetings that are simulcast to off-track wagering facilities.

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[3] The full text of ¶19 is set forth in Appendix A.

[4] SCOTWINC is the acronym for "Southern California Off-Track Wagering, Inc." SCOTWINC is a non-profit simulcast organization consisting of representatives of horse racing associations, racing fairs and organizations representing race horse owners, organized under the authority of B&P §19608.2 for the purpose, *inter alia*, of facilitating transmission of simulcast audio-visual signals from host racing associations in southern and central California (the "Southern Zone" as defined in B&P Code §19608.2) to off-track wagering facilities, operating the parimutuel wagering system at those facilities and integrating the wagers placed at off-track facilities and the wagers placed at the host track into a single parimutuel pool.

In 1992, while the Cabazon and Sycuan Bands' lawsuits were pending, the Barona and Viejas Bands also entered into substantially identical simulcast wagering compacts with the State of California authorizing those Tribes to operate simulcast wagering facilities. The principal difference between those compacts and the Cabazon compact was that rather than requiring the Barona and Viejas Bands to file additional lawsuits, the parties to those compacts agreed to be bound by the outcome in the Cabazon Band's lawsuit.

The Barona and Viejas Bands entered into their first operating agreements with the host Racing Associations and SCOTWINC in 1992. Those agreements were substantially identical to the operating agreements that the Racing Associations and SCOTWINC had entered into with the Cabazon and Sycuan Bands.

All of the annual operating agreements entered into among SCOTWINC, the Racing Associations and the Tribes and the Racing Associations and the Tribes between 1990 and 1994 contained the same paragraph 5(b):

> In the event that a final judicial determination is made that the State of California cannot impose its state license fee on wagers accepted at the Tribes' facility, Tribe shall be entitled to receive an amount equivalent to the state license fee on the gross amount of wagers at the Tribe's facility. To the date of such final judicial determination, Tribe shall recover such fees from the State, thereafter, such fees shall be paid by Operator [*i.e.*, SCOTWINC] directly to Tribe if Operator is authorized by the State to withhold such sums from the gross amount of wagers accepted at the

> Tribe's facility and to make such payment directly to the Tribe. Otherwise, Tribe shall recover such fees directly from the State.

Thus, there can be no doubt that, as early as 1990, and continuously thereafter, each of the Petitioners was fully aware that under ¶19 of the compacts, the *only possible* outcomes in the Tribes' lawsuits were that the funds at issue would go to either the State or to the Tribes, depending only on whether the imposition of the disputed state license fee was found to be permissible or impermissible under federal law. Under no circumstances does this language in the agreement signed by the Petitioners allow or even contemplate that those disputed state license fees would go to the Petitioners.

In 1992, the district court granted summary judgment for the State, holding that neither the legal incidence nor the economic burden of the State license fee fell upon the Tribes, and thus that the State's tax was not preempted by IGRA or principles of federal Indian preemption. *Cabazon Band of Mission Indians v. Wilson*, 788 F. Supp. 1513 (E.D. Cal. 1992) (*"Cabazon I"*), *supra*. In October, 1994, the Court of Appeals for the Ninth Circuit, while agreeing with the district court that the legal incidence of the State's tax was on the Racing Associations, rather than the Tribes, nonetheless reversed the district court. The grounds for reversal identified by the Appeals Court included the following: IGRA preempted the State's jurisdiction to deduct its license fee from wagers placed at Tribal simulcast facilities; under IGRA, the compacts – not State law – control the distribution of the "takeouts" from such wagers; and under the compacts, the Tribes were entitled to the State license fees that had been or in the future

would be deducted from wagers placed at Tribal facilities. *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) ("*Cabazon II*").[5] The Ninth Circuit remanded the case to the district court with instructions to enter summary judgment for the Cabazon and Sycuan Bands.

Shortly after the Court of Appeals entered its decision in *Cabazon II*, Petitioners informed respondent Tribes that if the State could not collect its license fee, Petitioners were entitled to retain the money that otherwise would be distributed to the State as a license fee. Respondent Tribes immediately and vigorously disputed this claim. *See*, letter dated November 25, 1994 from SCOTWINC to Mr. Daniel Tucker, Chairman, Sycuan Band of Mission Indians, and letter dated January 6, 1995 from George Forman to SCOTWINC, set forth, respectively, in the Appendix hereto.

The State did not seek review in this Court of the Court of Appeals' decision in *Cabazon II*. Instead, the State simply informed the Tribes that the decision in *Cabazon II* somehow had invalidated the compacts, and that because the Tribes were conducting what the State considered to be other gaming unrelated to simulcast wagering, the simulcast signals to the Tribal facilities would be terminated unless the Tribes ceased those other activities and entered into new simulcast compacts that did not entitle the Tribes to the license fee. Petitioners were fully aware of these developments.

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[5] This opinion, issued on rehearing, superseded the Ninth Circuit's original May, 1994 decision that had reversed the district court on a different preemption theory. *Cabazon Band v. Wilson*, 23 F.3d 1535 (9th Cir. 1994).

In response to the State's threat to discontinue the simulcast signal, the Cabazon and Sycuan Bands sought further relief against the State in the district court pursuant to 28 U.S.C. §2202, and the Barona and Viejas Bands filed motions to intervene accompanied by proposed complaints in intervention. The district court granted the motions to intervene and issued a temporary restraining order, but then determined that in order to enforce the Ninth Circuit's decision in *Cabazon II*, the Tribes would have to file amended complaints seeking to enforce the compacts.

After failing to obtain relief in the nature of mandamus from the Court of Appeals,[6] the Tribes filed their amended complaints in mid-1995. In response, the State asserted various affirmative defenses and counter-claims, including the defense that the Tribes' action should be dismissed under F.R.Civ.P. 19 for failure to join Petitioners as necessary parties. In an April 26, 1996 order, the district court granted the Tribes' motion to strike the State's affirmative defenses, including the Rule 19 defense, finding that the Tribes could obtain complete relief from the State in Petitioners' absence, that Petitioners had not claimed any interest in this action despite having had many years to have done so, and that the State had not explained how either it or Petitioners would be prejudiced by Petitioners' absence.

In the same order, the district court ordered the State to "report to the court within 14 days of the date of this

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[6] The Court of Appeals held that mandamus was inappropriate because the Tribes would have a full remedy on appeal.

order as to how it shall comply with the compacts in light of the ruling by the Court of Appeals." Petitioners' Appendix ("Pet. App.") 53. However, rather than reporting to the district court as ordered, on May 17, 1996, the State filed a motion for reconsideration that was noticed for hearing on July 12, 1996.

More than a month later, on June 27, 1996, Petitioners, by now represented by a former Deputy Attorney General who had represented the State in this action from commencement until late 1995, notified the parties of their intention to seek leave to intervene. On July 3, 1996, Petitioners filed an *ex parte* application to advance the hearing on their motion to intervene from its scheduled date of August 9, 1996, to July 12, 1996, the date scheduled for the hearing on the State's motion for reconsideration.

Contrary to the express requirements of Local Rule 6-142(e),[7] Petitioners did not even attempt to explain why they had waited more than two months after the district court's April 26, 1996 ruling to file their motion to intervene, or why they suddenly needed an order shortening time for which they could not obtain a stipulation from other counsel. As a practical matter, it would have been

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[7] L.R. 6-142(e) requires, in pertinent part, that an application for an order shortening time "shall set forth by affidavit of counsel the circumstances claimed to justify the issuance of an order shortening time. Ex parte applications to shorten time will not be granted except upon affidavit of counsel showing a satisfactory explanation for the need for the issuance of such an order and for the failure of counsel to obtain a stipulation for the issuance of such an order from other counsel or parties in the action."

impossible for Petitioners to offer a satisfactory explanation why they had delayed seeking intervention for nearly two years after the Ninth Circuit's October, 1994 decision in *Cabazon II*, seven months after the State filed amended answers asserting as an affirmative defense the Tribes' failure to join Petitioners, and more than two months after the district court had found that Petitioners were not indispensable to the just adjudication of this action among the existing parties.

On July 11, 1996, the district court entered its Memorandum and Order denying the motion to intervene as untimely. The district court explained that,

> The motion comes very late in these proceedings and long after proposed intervenors should have known about any interest they may have in the outcome of this litigation. Accordingly, the motion is DENIED as untimely. F.R.Civ.P. 24; *Engra, Inc. v. Gabel*, 958 F.2d 643, 644-45 (5th Cir. 1992).

Pet. App. 54.

The district court proceeded to enter a final judgment in favor of respondent Tribes, and both the State and Petitioners filed notices of appeal. The Court of Appeals affirmed both the district court's judgment on the merits and the denial of Petitioners' motion to intervene.[8] *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050 (9th

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[8] "Having made the strategic decision to rely on the State to advance their interests, the Applicants opted to delay moving to intervene in this litigation until long after they should have realized not only that their asserted interest was at stake, but also that their interest had diverged from the State's. They must

Cir. 1997) ("*Cabazon III*"). It is this judgment that Petitioners now petition this Court to review.

REASONS FOR DENYING THE WRIT

A. The Decision of the Court of Appeals is Fully Consistent with the Decisions of this Court.

While the denial of a motion to intervene technically may be the subject of a petition for writ of certiorari, as contended by Petitioners, this Court seldom has granted a petition for writ of certiorari on the question whether a district court abused its discretion in denying a motion to intervene except in extremely unusual and compelling circumstances. For example, in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corporation*, 510 U.S. 27, 29 (1993), cited by Petitioners, the Court observed that,

> While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case. Should we undertake to review the Court of Appeals' decision on intervention, it is unlikely that any new principle of law would be enunciated, . . . The Court of Appeals' disposition of petitioner's motion to intervene is simply not such a question.

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now live with the ramifications of their delay. They waited too long, and their application for intervention was untimely. The district court's decision to block intervention that late in the litigation was not an abuse of discretion."

Cabazon III at 1062, Pet. App. 26.

Unlike *Izumi, supra,* the Court granted certiorari in *United Auto Workers v. Scofield,* 382 U.S. 205, 209 (1965), also cited by Petitioners, to decide an important question that had split the federal Circuits: *i.e.,* whether a person or entity that was not a party to a proceeding before the National Labor Relations Board, but who/which might be adversely affected by the decision of the Court of Appeals reviewing the NLRB's decision, had a right to intervene in the Court of Appeals' review of the NLRB decision. No such important question, and no such split among Circuits, is present in this case.

This Court long ago established, and has not since deviated from, the principle that a district court's denial of a motion to intervene pursuant to F.R.Civ.P. 24, even as of right, is reviewable solely for abuse of discretion. *NAACP v. New York,* 413 U.S. 345 (1973). The Ninth Circuit consistently follows exactly the same rule. *See, e.g., United States v. State of Washington,* 86 F.3d 1499 (9th Cir. 1996); *see also, County of Orange v. Air California,* 799 F.2d 535 (9th Cir. 1986); *Empire Blue Cross and Blue Shield v. Janet Greeson's A Place for Us, Inc.,* 62 F.3d 1217 (9th Cir. 1995);[9] *League of United Latin American Citizens v. Wilson,* 131 F.3d 1297 (9th Cir. 1997).[10] Moreover, that is precisely the standard of review that the Court of Appeals applied

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[9] "It seems inequitable to allow a latecomer, who fiddled while Rome burned, to collect a share of the fire insurance."

[10] "This appeal simply reveals a case of 'too little, too late.' ACNFARI slept on its intervention rights for more than two years. When it awoke, it was unable convincingly to explain its delay. The district court was correct to deny its motion."

in this case. *Cabazon III*, 124 F.3d 1050, at 1061, Pet. App. 26.

Although the district court may not have set forth in detail the reasons why it determined that Petitioners' motion to intervene was untimely, the record before the district court provided ample evidence that Petitioners had inexcusably delayed in asserting claims about which they had been aware for years, and which they could have asserted at any time during the more than *six years* that the action had been pending up to that point. Moreover, in affirming the district court, the Court of Appeals was not limited to the specific ground(s) relied upon by the district court. *Fosson v. Palace (Waterland), Ltd.*, 78 F.3d 1448 (9th Cir. 1996).

The Court of Appeals noted that the interest that Petitioners belatedly attempted to assert in their motion to intervene "was apparent early in this litigation[.]" and

> Moreover, under the terms of the Compacts, of which the Applicants were aware, it is clear that the State and the Bands agreed that the State would continue to collect the fees from the racing associations, regardless of whether the court found them permissible under IGRA. Paragraph 19(B)(2) and 19(B)(3) clearly contemplate that either the State or the Bands would receive those fees.

Cabazon III, at 1061, Pet. App. 26.

Finally, the Court of Appeals found that,

> Assuming arguendo that the Applicants had no immediate interest in the original litigation, surely they should have known what was in the

> offing after our October 1, 1994 decision in *Cabazon II* and after the district court, on July 12, 1995, ordered the Bands to file a new complaint to enforce Paragraph 19(B)(3). . . . Nonetheless, the Applicants waited and watched. . . . Thus, by the time the Applicants moved to intervene on July 3, 1996, the district court had already directed the State to pay the fees to the Bands, effectively resolving the dispute. Even if the court had granted the intervention, the Applicants would only have been able to participate in the motion for reconsideration.

Cabazon III, at 1061-62, Pet. App. 26.

There simply can be no doubt that the district court properly exercised its discretion to deny intervention, given the fact that if Petitioners seriously believed that they had any colorable right to the disputed fees in the event that the imposition of the fees might be ruled impermissible, Petitioners could – and should – have moved to intervene even before the Court of Appeals ruled in October, 1994 that the Tribes are entitled to the disputed license fees. Thus, Petitioners had absolutely no excuse for not seeking intervention after the October 1, 1994 decision of the Court of Appeals became final and the case was remanded to the district court for entry of summary judgment for the Tribes.

By the time that Petitioners finally moved to intervene, more than a year had elapsed since the State had begun its effort to abrogate the compacts. A year had elapsed since the district court had ruled that the Tribes would have to file amended complaints and complaints in intervention to enforce the compacts, and that the State would be allowed to assert affirmative defenses and

counterclaims, including that Petitioners are indispensable parties. By the time Petitioners notified the existing parties of their intention to seek intervention, the legal issues had been completely reviewed and resolved by the district court, and all that remained for the district court to do was to deny the State's baseless motion for reconsideration and enter the judgment the Tribes had been seeking since 1990, and to which the Tribes had been entitled since October 1, 1994.

To have granted the motion for intervention at that point would have subjected the Tribes to further lengthy delays, substantial additional litigation-related expenses and fees, and further postponement of receipt of revenues needed to fund the operation of their Tribal governments and provide governmental services to their Reservation communities. These delays, additional expenses and deprivation of substantial revenues to which the Tribes were and are entitled, would have clearly prejudiced respondent Tribes.

B. Petitioners Improperly Attempt To Raise Issues that were not Raised or Decided Below.

Most of the Petition consists of the arguments that Petitioners hoped to make on the merits of their claims if the district court had granted their motion to intervene. However, because the motion to intervene was denied as untimely, the district court neither reached nor ruled on the merits of any of these arguments, although the Court of Appeals described the existence of Petitioners' claimed interest as "questionable." *Cabazon III*, at 1061 n.3, Pet. App. 26.

It has long been this Court's rule that this Court will review only those questions that were properly raised by the parties in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). Petitioners should not now be allowed to argue the merits of their illusory claims made in its Petition.

The Court of Appeals actually gave Petitioners far more solicitude than they deserved. Neither under State law, the actual language of ¶19 of the Compacts,[11] nor the positions taken by the existing parties,[12] has there ever

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[11] The language of ¶19(B) of the Cabazon Compact is set forth in the Court's Opinion in *Cabazon III*, 124 F.3d at 1050. Paragraph 19(B)(3) of the Sycuan Compact provides as follows:

> In the event a final judgment is obtained the deduction and distribution of a state license fee is impermissible under the Act, and following the exhaustion of all appellate review, the State shall pay over to Sycuan the amount of the state license fee previously distributed to the State under this Compact, exclusive of the assessments due and owing under subparagraph (4) below, and Sycuan shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering facility. The amount of state license fee previously distributed to the State and not reasonably claimed by the State as due and owing from the commencement of operation of the facility, and such pre- or post-judgment interest, if any, as the Court may determine, shall be paid over to Sycuan as soon as practicable, and in any event not later than sixty (60) days following the entry of final judgment.

[12] The State has argued from the beginning that its tax is on the Racing Industry and thus is not impermissible under IGRA. The Tribes have argued from the beginning that the State's tax on wagers at the Tribes' simulcast facilities is impermissible

been any possibility that Petitioners might be entitled to the windfall that they sought by its untimely application for intervention. Conversely, IGRA specifically authorizes the result of both *Cabazon II* and *Cabazon III*, in that 25 U.S.C. §2710(d)(3)(C)(iv) specifically contemplates the shifting of taxation of on-Reservation Class III gaming activity from the State to Tribes.[13] That is, in effect, exactly what the State and the Tribes agreed in these Compacts, and that is why *Cabazon II*, the district court and *Cabazon III* all determined that the Tribes – and thus not Petitioners – are entitled to an amount equal to past and future State license fees on the gross handle of wagers at the Tribes' simulcast facilities.

Petitioners' reliance on cases dealing with post-judgment motions to intervene in class actions (*United Airlines*

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under IGRA regardless of the legal incidence of the tax, that IGRA allows the State and the Tribes to alter the State's statutory distribution formula so that the Tribes will receive the tax that the State otherwise would receive, and thus that under the Compacts, the Tribes are entitled to receive an amount equivalent to the State tax on bets at their facilities.

[13] That section provides in relevant part:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . .

Thus, under *Cabazon II*, if the State cannot tax wagers placed at the Tribes' facilities, the State and the Tribes may agree in their Compacts that the Tribes may do so.

v. McDonald, 432 U.S. 385 (1977)), allowance of intervention when an existing party that had represented an intervenor's interest suddenly changes its position to the intervenor's detriment (*Legal Aid Society of Alameda v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980), *Pellegrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953)), and cases involving new and distinct phases of ongoing litigation that create materially changed circumstances (*United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984)), for the proposition that the mere passage of time does not render intervention untimely, is completely misplaced. In each of those cases, the court was able to find that the applicant's delay in seeking intervention not only had not prejudiced the existing parties, and that granting intervention would not result in the relitigation of matters already settled between the existing parties, but that the applicant could not reasonably have been expected to intervene sooner.

In this case, absolutely nothing prevented Petitioners from intervening at the outset of the litigation. Moreover, because the existing parties' respective theories of the case would not have allowed any recovery by Petitioners, not even the State can be said to have represented Petitioners' claimed interest. Therefore, notwithstanding the leniency to be shown toward intervenors as of right, Petitioners' utter failure to offer any credible justification for more than six years of deliberate inaction amply supports the district court's exercise of its discretion to deny intervention.

In hindsight, Petitioners may have "bet on the wrong horse" by sitting back and letting the State represent their purported interest in the license fees, but that is the

choice that Petitioners freely made, and they must now live with the consequences of that choice.

C. The Grounds for the Petition are Precluded by the Law of the Case.

The doctrine of the law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618 (1983). The Ninth Circuit interprets and applies this jurisprudential doctrine so as to require the decision of an appellate court on a legal issue to be followed in all subsequent proceedings in the same case. *In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996); *Kimball v. Callahan*, 590 F.2d 268, 771 (9th Cir. 1974), *cert. denied*, 444 U.S. 826 (1979);[14] *see also, Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997, en banc).[15]

The law of the case doctrine is not absolute, in that the prior decision should be followed unless 1) the decision is clearly erroneous and its enforcement would work a manifest injustice, 2) intervening controlling authority

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[14] "[U]nder the 'law of the case' doctrine one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case."

[15] "Law of the case rules are founded upon 'the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.' " *Id.*, at 1489.

or statute makes reconsideration appropriate, or 3) substantially different evidence was adduced at a subsequent trial. *Jeffries v. Wood, supra,* at 1489. None of those exceptions apply in this case.

Respondent Tribes' entitlement to the disputed State license fees was established in *Cabazon II,* and that entitlement, which has not been shown to have been clearly erroneous, became final in January, 1995 when the State failed to petition this Court for a writ of certiorari. No intervening change in the law or facts justifies discarding the six years of litigation between the State and the Tribes that preceded Petitioners' belated application for intervention. Petitioners did not offer any evidence that was not presented or available to the lower courts in *Cabazon I, Cabazon II* and the petitions for rehearing filed in the Court of Appeals.

For Petitioners to prevail on their claim to the disputed fees, this Court would have to allow Petitioners to completely relitigate the central issue that was finally decided in *Cabazon II.* No reason exists in law, logic or justice to accommodate Petitioners' belated desire to reap an unanticipated and undeserved windfall.

CONCLUSION

For all of the above reasons, the Court of Appeals was correct in determining that the district court did not abuse its discretion in denying Petitioners' motion to intervene as untimely, and no substantial federal question is presented to this Court for review.

Dated: May 12, 1998

Respectfully submitted,

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JOHN WINKLEMAN
Attorney for the Viejas Band of Mission Indians

[LOGO] ***Southern California Off-Track Wagering, Inc.***

[LOGO]

November 25, 1994

Mr. Daniel Tucker, Chairman, Tribal Business Committee
Sycuan Band of Mission Indians
5459 Dehesa Road
El Cajon, CA 92019

RE: *Simulcast and Parimutuel Operations Agreement*

Dear Mr. Tucker:

As you know, the Simulcast and Parimutuel Operations Agreements for the 1994 racing year (the "Simulcast Agreements"; capitalized terms contained herein have the meaning set forth in the Simulcast Agreements) by and among Southern California Off-Track Wagering, Inc. ("Operator"), the Sycuan Band of Mission Indians ("Tribe") and each of the organizations listed on Exhibits A thereto during the period of their racing meet ("Track"), expire at the end of the race meets currently in progress (December 17, 1994 for Night Racing and December 24, 1994 for Daylight Racing). In connection with the upcoming negotiations regarding the renewal of the Simulcast Agreements, Operator proposes that Section 5(b) of the Simulcast Agreements be deleted in its entirety.

In the event Tribe's challenge to the permissibility of the state license fee deducted for the total wagers at Tribe's simulcast facility is successful, Operator does not

agree to be obligated to pay to Tribe an amount equal to such state license fee. Whether Tribe is entitled to receive an amount equal to the state license fee is solely a matter between Tribe and the State of California. Tribe should, as required by the Compact, look to the State of California for any such payment and not to Operator. In fact, a requirement that Operator make such payment is inconsistent with the terms of the Compact.

Furthermore, under the California Horse Racing Law, if the State of California cannot impose its state license fee on wagers accepted at Tribe's facility, the amount deducted for such fee would be surplus revenue to be divided equally between the applicable racing association and the horsemen. Operator does not believe that the California Horse Racing Board (in its capacity as the Compact negotiator for the State of California) has the right or authority to unilaterally change the operation of the California Horse Racing Law (i.e. by negotiating away revenue that otherwise would have been shared between the applicable racing association and the horsemen) without proper legislative action.

Operator looks forward to another year of operating and administering the simulcast wagering system at Tribe and to finalizing the renewal of the Simulcast Agreements with you shortly. If you have any questions regarding the matters discussed herein please do not hesitate to call me at (714) 761-1660.

Very truly yours,

/s/ Alvin A. Karwacki
General Manager

cc: George Forman Craig Fravel Lawrence Goldman

LMG/ajc

ALEXANDER & KARSHMER

ATTORNEYS AT LAW

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[Names Omitted In Letterhead]

January 6, 1995

VIA TELECOPIER AND U.S. MAIL

Alvin A. Karwacki, General Manager
SCOTWINC
4961 Katella Avenue
Los Alamitos, CA 90720-2799

Re: Simulcast and Parimutuel Operations Agreement

Dear Mr. Karwacki:

In your November 25, 1994 letter concerning the renewal of the Simulcast Agreements for the coming racing year, you proposed that Section 5(b),[1] pertaining to

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[1] In the event that a final judicial determination is made that the State of California cannot impose its State license fee on wagers accepted at Tribe's facility, Tribe shall be entitled to receive an amount equivalent to the State license fee on the gross amount of wagers accepted at Tribe's facility. To the date of such final judicial determination, Tribe shall recover such fees from the State; thereafter, said fees shall be paid by Operator directly to Tribe if Operator is authorized by the State to withhold such sums from the gross amount of wagers accepted at Tribe's facility and to make such payment directly to Tribe. Otherwise, Tribe shall recover such fees directly from the State.

the contingent Tribal entitlement to an amount equivalent to the State license fee, be deleted in its entirety, because in the event that the Tribal challenge to the applicability of the State license fee on wagers placed at Tribal facilities is successful,[2] SCOTWINC "does not agree to be obligated to pay to Tribe an amount equal to such state license fee."

Your letter gave four justifications for SCOTWINC's position:

1) the Tribe must look to the State for such payment, rather than to SCOTWINC, as required by the Compact;

2) requiring SCOTWINC to make such payment would be inconsistent with the terms of the Compact;

3) if the State cannot impose its license fee, that amount would be "surplus revenue" that should go the host association and the horsemen; and

4) SCOTWINC does not believe that the CHRB has the right or authority to unilaterally change the operation of the Horse Racing Law without proper legislative action.

We have consulted with legal counsel for the other Tribes that now have Agreements with SCOTWINC, and all concur in our opinion that SCOTWINC's request for deletion of Section 5(b) lacks any basis in law or fact, and thus that Section 5(b) should not be deleted at this time.

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[2] The Cabazon and Sycuan Compacts specifically authorized the Tribes to bring their respective lawsuits.

Indeed, it seems clear to us that once the existing litigation between the State and the Tribe terminates in the Tribes' favor, that Section will need to be revised to affirmatively provide that SCOTWINC shall deduct and pay over to the Tribes the amounts that otherwise would be deducted and paid to the State as license fees.

The Simulcast Agreements do not exist in a void; rather, they must be understood and interpreted in the context in which they were made. In this case, that context includes not only the Horse Racing Law, but also the Tribal-State compacts that were entered into between the Tribes and the State, and which were approved by the Secretary of the Interior. This is a critical point, because in the absence of the compacts – which are authorized and approved pursuant to *federal* law – the Tribes would not be legally entitled or able to operate simulcast wagering facilities at all.

The authority for the Tribes to enter into agreement with, *inter alia*, SCOTWINC to receive simulcast signals and conduct parimutuel wagering on simulcast races is conferred in Article 8(A), which specifically admonishes that,

> No such simulcast organization shall refuse to enter into such an agreement with [the Tribe] on the ground that [the Tribe] is not an entity eligible to be authorized to operate a simulcast wagering facility under state law, or that the proposed agreement with [the Tribe] is otherwise inconsistent with another provision of state law, or with the Rules and Regulations of the Board, *as long as the proposed agreement between [the Tribe] and the simulcast organization complies*

> *with federal law and with the terms of this Compact.* . . . Except as herein provided, nothing in this Compact is intended to alter in any way the rights of the simulcast organization under state law. [Emphasis added].

The meaning and intent of this section of the Compacts could not be clearer: to the extent that federal law and/or Compact provisions differ from State law in defining SCOTWINC's relations with the Tribes, federal law and/or Compact provisions will control that relationship. Thus, under the Compacts, SCOTWINC would have no right to refuse to enter into an agreement with a Tribe, or to include a particular provision in a Simulcast Agreement, merely because entering into an Agreement or agreeing to a particular provision is not authorized by State law, as long as it is not contrary to federal law or the controlling Compact.

Article 19(A) of the Compacts provides that "*Subject to subparagraphs (B) and (C) below,* the amounts deducted from parimutuel wagers at [Tribal facilities], and the distribution of such amounts, shall be the same as provided for under state law for simulcast wagering facilities, other than fairs, in the southern zone." The critical subparagraph (B)(3) provides that if the Tribes prevail in their lawsuit about the State license fee, the State is to pay over to the Tribes all license fees previously distributed to the State (exclusive of a negotiated assessment for actual regulatory costs), and the Tribes "shall thereafter be entitled to receive an amount equivalent to the state license fee from all wagers at the Sycuan simulcast wagering

facility." In other words, if the Tribes prevail, the *distribution* of the amounts deducted from wagers at Tribal facilities will be adjusted so that the amounts previously deducted and paid over to the State as license fees instead wil be deducted and paid over to the Tribes, less an agreed amount to reimburse the State for its regulatory costs.[3]

Based upon the clear language of the Compacts, SCOTWINC's contention that each Tribe's entitlement to receive an amount equal to the State license fee "is solely a matter between Tribe and the State of California[,]" simply is incorrect, as is SCOTWINC's contention that the payment over to the Tribes of amounts equal to the State license fee would be inconsistent with the terms of the Compacts.

The same flaws fatally infect SCOTWINC's contention that if the State cannot impose its license fee on wagers accepted at the Tribal facilities, the amounts deducted for such fees would be "surplus revenue to be divided equally between the applicable racing association and the horsemen." Because the Compacts require that money otherwise distributable to the State as a license fee must be paid over to the Tribes, there is no "surplus revenue" to be divided between the applicable racing association and the horsemen.

The California Horse Racing Board has been authorized by the Legislature to represent the State in

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[3] This assessment is to be separately negotiated between the State and the Tribes. The manner in which payment will be made is to be resolved in those negotiations.

negotiating compacts with the Tribes concerning horse-racing activities. Bus. & Prof. Code §19445. Each of the compacts now in effect was negotiated by the CHRB with the able assistance of the Attorney General; each was signed by the Governor; and each was approved by the Secretary of the Interior pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2710(d). Thus, as a matter of both State and federal law, those compacts now control the conduct of simulcast wagering activities on the Indian lands of the signatory Tribes, and under both the Supremacy Clause of the U.S. Constitution, Art. VI, Cl. 2, and the laws and regulations of the State of California, those compacts apply to and are binding on SCOTWINC, the racing associations, the racing fairs and the horsemen.

For all of the reasons set forth above, we look forward to promptly receiving from SCOTWINC new Agreements that continue to include Section 5(b), so as to ensure no interruption in the constructive working relationship that the parties heretofore have developed and maintained. If you feel that a meeting among legal counsel would help to resolve this issue, please let us know, and we would be happy to help coordinate such a meeting.

Very truly yours,

ALEXANDER & KARSHMER

/s/ George Forman
George Forman

GF:ab
cc: Art Bunce, Esq.
Glenn Feldman, Esq.